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IN THE

Supreme Court of the United States

October Term, 1965

No. 75

AMERICAN DISTRICT TELEGRAPH COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA.

On Appeal from the United States District Court
For the District of Rhode Island

BRIEF FOR APPELLANT AMERICAN DISTRICT TELEGRAPH COMPANY

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OPINION BELOW

The District Court's findings of fact, conclusions of law, and opinions on liability and remedy are reported at 236 F. Supp. 244 and 1964 Trade Cases ¶71,298.

JURISDICTION

This civil suit for injunctive relief against alleged violations of Sections 1 and 2 of the Sherman Act was instituted under Section 4 of that Act (Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. §4). The defendants are this appellant, American District Telegraph Company ("ADT"), its parent, Grinnell Corporation ("Grin-

nell"), and two of Grinnell's other alarm company subsidiaries, Holmes Electric Protective Company ("Holmes") and Automatic Fire Alarm Company of Delaware ("AFA"). All of the parties, including the Government, have appealed from the judgment below. (Nos. 73, 74, 76 and 77).

The judgment was entered on November 27, 1964. ADT's notice of appeal was filed on January 26, 1965. Mr. Justice Goldberg, by an order dated March 23, 1965 (R. 785, 787), extended the time for docketing the case and filing the record to April 19, 1965. Probable jurisdiction was noted on May 17, 1965. Jursdiction is conferred by Section 2 of the Expediting Act of February 11, 1903, c. 544, 32 Stat. 823, as amended, 15 U. S. C. §29. *Brown Shoe Co., Inc.* v. *United States,* 370 U. S. 294 (1962).

QUESTIONS PRESENTED

The ultimate questions presented by the defendants' appeals are:

Whether the District Court erred in concluding that ADT, with the other defendants, ADT's parent and its other subsidiaries, violated Sections 1 and 2 of the Sherman Act.

Whether the District Court's post-trial creation of presumptions of illegality and its overall conduct of the proceedings below so departed from governing judicial standards as to deprive defendants of a fair trial, denying to ADT its right under the Fifth Amendment to the Constitution of the United States not to be deprived of liberty or property without due process of law.

Within these ultimate questions there lies a broad range of subsidiary questions, including, *inter alia,* the following which are discussed in detail in ADT's brief:

1. Did the District Court err in finding asserted monopoly power based solely upon (a) a wholly artificial product or service definition of the relevant market, adopted upon the assumption that the criteria established by this

Court in *Cellophane*[1] are no longer controlling, (b) exclusion from the total market of other concerns' revenue identical in source to revenue of defendants included in determining their asserted market share, and (c) the conclusion that the geographic limits of the market were national rather than local?

2. Did the District Court err when, inferring that defendants had monopoly power solely upon the basis of stated percentages of a Government-defined relevant market, following trial it expressly shifted to defendants the burden of proving that they had *not* monopolized, had *not* attempted to monopolize, had *not* engaged in restraints of trade, and therefore had *not* violated Sections 1 and 2 of the Sherman Act?

3. Were the District Court's findings of fact and ultimate conclusions based thereon clearly erroneous?

4. Did the District Court err in (a) entering a decree enjoining defendants in unlimited statutory terms "from further restraining trade, or attempting or combining to restrain trade * * * and * * * attempting to monopolize, or conspiring to monopolize, or monopolizing that designated market," and (b) prohibiting ADT from employing in any capacity a non-defendant individual who is chairman of its board of directors?

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, c. 647, 26 Stat. 209, as amended, 15 U. S. C. §§1, 2 provide in pertinent part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

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1. *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377 (1956).

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

STATEMENT

The appeal by ADT raises certain questions also comprehended in the appeals of one or more of the other defendants. In view of the number and complexity of those questions and the fact that this Court has, for oral argument, consolidated these appeals, the defendants have prepared their respective briefs with a view to avoiding unnecessary duplication. As to those record facts and arguments pertinent to the questions raised by ADT but not fully treated in this brief, ADT respectfully directs the attention of the Court to the other defendants' briefs. Initially, therefore, ADT refers to the Statement contained in the Grinnell brief, which sets forth the businesses and relationships of the defendants, the general nature of the Government's complaint, the proceedings in the District Court, the decision rendered, and the decree entered, portions of which constitute an essential preliminary reference for the arguments presented herein. With that predicate, ADT limits its Statement to a brief outline of certain threshold facts pertinent to the arguments treated primarily in its brief.

This case is concerned with a variety of protection services and systems. Among these are a substantial number which employ alarm systems of electric equipment and devices placed upon the premises of parties seeking protection against any of a variety of different hazards or conditions. These systems are classified in terms of the general or specific hazard or use to which they are directed, such as fire alarms, burglar alarms, holdup alarms, industrial process supervision, and so on through a broad variety

of particular, differentiated end uses. Different systems, made up of wholly different devices and equipment placed upon the protected premises, are used for each specific hazard or end use.

These electric systems may be further classified in terms of the location at which are received the alarms or signals triggered when the devices detect or react to the specific hazard, risk or environmental condition. Thus, even though the systems placed upon the protected premises for a specific risk or use may employ the same detection devices and equipment, they can be connected to a variety of different alarm or signal-receiving sites, either singly or in combination.

When connected to audible or visible alarms, such as bells, gongs, sirens or lights located at the protected premises, they are known as "local alarm systems." The systems may, however, be connected to consoles, panels or other receiving equipment situated at any one of several locations and manned or monitored continuously for appropriate action. A "proprietary system" is connected to such receiving equipment located on the protected premises. A "telephone answering system" is connected by leased telephone lines to such equipment at a telephone answering service or exchange. A "direct connected" (or "remote station") system is connected by leased telephone lines to such equipment at the fire or police department. A "central station" system is connected by leased telephone lines to such equipment at a central station or office operated by an alarm company. An "auxiliary system" is connected by the municipal fire alarm circuit to the fire department. (GX 1, R. 789; GX 2, R. 813; GX 3, R. 843, 327)[2]

2. Throughout this brief the following references are used: "FF" and "CL" refer to the District Court's findings of fact and conclusions of law, and "OL" and "OR" refer to paragraphs of the court's opinions on liability and remedy, respectively. "GTB" refers to the Government's Trial Brief, "GPB" refers to the Government's Post-Trial Brief, "GRB" refers to the Government's Reply to Defendant's Post-Trial Brief, and "GJS" refers to the Government's Jurisdictional Statement filed with this Court. "GX" refers to Government Exhibits and all other letters refer to defendants' exhibits. Where por-

While some of these electric systems are sold to parties who seek to protect their premises, more often they are furnished by alarm companies which install them and provide continuing service, including inspection, maintenance, repair and replacement as needed, for subscribers who pay an initial sum and monthly or annual service charges pursuant to term agreements. For example, alarm companies in various cities offer central station protective services (designated by the court below as "CSPS") which embody "maintenance of a central station, installation and maintenance of hazard detecting devices on the subscribers' premises, connection of these devices to the central station by wires leased from the local telephone company, and receipt and handling of alarms transmitted to the central station from the subscribers' premises." (FF 2, R. 747)

Underwriters of fire and burglary insurance allow a reduction of premiums to insureds having various protection services or systems. Certain approved electric protection system services, including some of the central station services, can qualify subscribers for such premium discounts or credits. (FF 5, R. 748) Insurance discounts available in connection with central station services require "accreditation" by independent rating agencies of the central station and its operation pursuant to established standards. Subscribers served by such central stations who desire insurance discounts must comply with the rating agencies' additional standards as to the number, placement and types of devices used at their premises; the installation, ownership, maintenance, inspection and testing of those devices by the central station; and other criteria. For example, to obtain insurance discounts, a central station burglary service subscriber must use an accredited central station and must elect to have his own premises, the system there,

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tions of the record below not included in the printed transcript of record are cited, they are referred to in keeping with the original pagination of the District Court record (*e.g.*, GX 343, p. 67). Where exhibits are cited, the last "R." numbers given are those at which the exhibits were offered in evidence (Rule 40, par. 2). Unless otherwise noted, emphasis in quoted passages has been supplied.

and its testing and maintenance approved or "certified" by a rating agency. (GX 1, R. 789; GX 3, R. 843, 873; GX 5, R. 1012, 327)

In business since the late 1800's, ADT was a subsidiary of Western Union Telegraph Company until 1953. Originally its principal business consisted of the furnishing of messenger services from the various Western Union offices around the country. Around the turn of the century, ADT, Holmes and AFA pioneered the central station concept, which was subsequently expanded to the wide variety of services now offered. Its relationship with Western Union made available to ADT the nationwide system of Western Union offices, which ADT used to open central stations. Access to this network of offices, familiarity with the cities served, and a base of revenue in other lines of business gave ADT a unique opportunity to introduce central station services to many markets across the country. Like most accredited CSPS concerns, ADT also furnishes other electric protection services such as local, proprietary and direct connected.[3]

The Government's complaint alleges that the defendants have violated Sections 1 and 2 of the Sherman Act by combining and conspiring to restrain and monopolize trade *solely* in the insurance-accredited central station segment of the electric protection service industry. More specifically, the complaint alleges an overall, unitary and continuing combination and conspiracy to divide types and areas of service, to acquire accredited CSPS firms, to preclude entry of competition into that business, and to engage in predatory pricing to destroy such competition. (R. 32, 37-38)

In its conclusions of law, the District Court held that defendants had violated Sections 1 and 2 of the Sherman Act in that ADT, AFA and Holmes, "during their growing period," had in 1907 and earlier entered into written agreements, now lapsed and legally no longer effective, which allocated geographic markets and classes of customers; that

3. FF 14, R. 749; R. 549-50, 556-58; W40a, R. 5575-76; W41a, R. 5623; W44a, R. 5655, 497, 595-96.

thereafter the defendants "had continued adherence to the patterns formed in violation of law"; that as a "monopolistic combination" the alarm company defendants had restrained trade *in violation of Section 1* in that they "manipulated their own prices to forestall competition"; that these restraints of trade were a chief avenue by which they attempted to monopolize, conspired to monopolize, and did monopolize the asserted "national market in the accredited CSPS industry"; and that "perhaps even more effective" as a means to monopolization were their "acquisitions of *competing* companies". (CL 1-6, R. 760-61)

SUMMARY OF ARGUMENT

I. A. The District Court adopted *in toto* the Government's contention that there is a nationwide market limited to accredited central station services and held that once it is established "how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of Section 2." Announcing this proposition for the first time after trial, the court concluded—based solely upon defendants' 87% of the total revenue of accredited central stations (including both insurance-approved and unapproved services)—that defendants "stand condemned". The court reached this conclusion even though it failed to find that defendants have the power to control price or competition essential to any conclusion of monopoly, finding instead that they do not have "unfettered power to control the price of their services" because of the competition of other forms of protection and that new entries have not been deterred nor have any CSPS firms failed or been driven out of business. Even if the District Court's post-trial presumptions of criminal conduct could be sustained, the market definition and percentages which are the only predicate for those presumptions are patently invalid because of the court's improper legal tests and clearly erroneous findings. (pp. 19-22)

B. The finding of a nationwide market is clearly erroneous and in disregard of the governing legal standards. The District Court's conclusion was founded solely upon defendants' (primarily ADT's) operation of central stations in many cities and their alleged use of interstate commerce in connection with some aspects of internal corporate administration. The great bulk of accredited CSPS concerns operate in but one city or locality. Subscribers to such services can turn only to a central station in their locality and those services, embodying purely localized operational routines, are rendered only within an effective radius of not more than 25 miles. Requirements for insurance-approved services limit them to far shorter distances from the central station, because central station employees must be able to reach subscribers' premises quickly. Central stations also require customer concentration within a small area because the costs of providing service increase steadily as subscribers' locations approach the limits of the feasible service range. From one city or locality to another, there are marked variations in the costs of furnishing and the price levels prevailing for accredited central station services. Insurance accreditation is granted only on a local, single station basis, and each of the significant functions supporting the structure of insurance approval, including inspection, certification, and determination and granting of premium discounts (which vary from one area to another), is locally performed either by the underwriters, their designated local and state rating and inspection agencies, or the local alarm companies.

Central stations located in one locality simply cannot compete with those in another locality, and there is no evidence of record to support the lower court's national market conclusion. That conclusion is contrary to the standards enunciated by this Court, which has uniformly held that where a customer ordinarily does not leave his particular locality to buy a product (here service) and when the sellers cannot furnish or deliver their products or services from outside that locality there is only a local geographic market. The prejudicial import of the lower court's er-

roneous nationwide market conclusion is underscored by the Government's effective concession that many cities where ADT operates are incapable of supporting more than one central station. Under the market definition accepted below, these natural monopoly markets in which ADT has pioneered accredited central station services are illogically and unfairly counted against the defendants. (pp. 22-37)

C. The District Court refused to apply the market test mandated in *Cellophane* (351 U. S. 377 (1956)) when the existence of the monopoly power requisite to a finding of monopolization in violation of Section 2 of the Sherman Act is in issue. The court below mistakenly applied narrow Clayton Act market definitions for mergers, losing sight of the fact that the decisions by this Court and others have regularly distinguished between the market definition standards governing these two statutes. The lower court thus rejected the "reasonable interchangeability of use or cross-elasticity of demand" concept which is the only proper test of market definition where the power to control prices or exclude competitors is the question.[4] Ignoring *Cellophane's* rule "that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of trade or commerce', monopolization of which may be illegal" (351 U. S. at 395), the court (1) erroneously lumped together in a single "market" diverse and unrelated end use central station services which are not substitutes for each other and totally lack any interchangeability or cross-elasticity of demand, and (2) arbitrarily excluded from that "market" the impact of other effectively competing forms of protection, including the other electric protection systems and services employing the same types of equipment, operating concepts, and commercial relationships with subscribers. (pp. 37-44, 116-19)

The market definition, revenues and share percentages urged by the Government and adopted by the District

4. "The 'market' which one must study to determine when a producer has monopoly power * * * is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." (351 U. S. at 404)

Court as the sole basis for its presumption that defendants are guilty of the crime of monopolization include a broad variety of different services which have in common only their use of a central station to receive signals. These services differ radically in function, devices and equipment, end use, types of customers, price and insurance treatment. Combining such diverse major categories (which include many distinctive sub-categories) as premises burglar alarms, safe and vault burglar alarms, holdup alarms, watchman's reporting service, manual fire alarms, sprinkler supervisory alarms, waterflow alarms, automatic fire alarms and industrial process supervisory services, the market found below includes services which are neither substitutes for nor competitive with each other. Clearly no customer will substitute a fire protection service for a holdup alarm service or an industrial process supervisory service, such as monitoring the temperature of a glue pot. Such services are just not interchangeable, either functionally or reactively, and demand and prices for one have no competitive impact upon demand or price for the other, so that there is an essentially total absence of cross-elasticity. They cannot be forced into a single market where, as here, the question to be answered is whether defendants have the power to control price or competition. (pp. 44-57)

Market definition is pertinent here only in terms of whether defendants have the power to control price or exclude competition. If the impact of competition from other forms of protection precludes such power, it cannot be found on the basis of defendants' percentage of the accredited central station business. The record evidences the Government's failure to prove that accredited central station services are so distinctive in the minds of customers and in terms of their buying conduct as to preclude meaningful competition by other forms of protection, with reasonable interchangeability or cross-elasticity of demand. The District Court erred, both in fact and law, in disregarding such competition. Where, as here, at the very least substantial numbers of customers elect between accredited central station services and competing forms of

protection on a composite of price, quality and characteristics and there is effective, meaningful competition producing cross-elasticity of demand, defendants are not shown to have monopoly power. And this is true whether the outermost limits of the market have been defined, whether every dollar of business comprising the market has been counted, whether each of the many other forms of protection competes with every one or only some of the accredited central station services, or whether *some* customers will consider only an accredited central station service or only another form of protection. (pp. 57-62)

Rejecting the principles of *Cellophane* ("I just don't think there is anything to that as a matter of law") and announcing that cross-elasticity of demand "went out of the effective vocabulary of antitrust defendants, [and] is also an aberration,"[5] the District Court accepted factual contentions of the Government contrary to the evidence and applied erroneous legal standards, effectively relieving the Government of its burden of proof and ignoring the wealth of evidence disproving its market definition. In each instance focusing upon only one type of central station and competing service (*e.g.*, local versus central station burglar service), the Government attempted to catalog asserted differences in characteristics, quality and efficiency, prices, classes of customers and an allegedly preponderant shift to accredited central station services to support its contentions that no other forms of protection compete with them. Most significantly, however, the Government relied upon not a single protection customer or prospect to support its contentions.

In fact, the record conclusively demonstrates that the other electric protection systems and services embody basically the same physical equipment and functional concepts and are furnished upon the basis of commercial relationships essentially identical in all respects. (pp. 62-68)

Further, the Government's contentions as to superior quality were premised (1) upon the sales-oriented promotional arguments of accredited central station witnesses

5. R. 393, 544

necessitated by their admitted competition with other forms of protection (the alleged superiority was vigorously challenged by representatives of those competitors), and (2) upon supposedly much larger insurance discounts universally available impliedly for all central station services. The record is wholly lacking in any testimony by customers that they deem accredited central station services superior to other forms of protection, and the evidence affirmatively disproves findings that "discounts of almost standard nature" afford "a far larger reduction of premiums for accredited central station service," from which the District Court reached the sweeping conclusion that such services are therefore "qualitatively * * * a new class." (pp. 69-91)

Similarly, there is no record support for the Government's leading the District Court uncritically to findings that central station services invariably cost more, indeed several times more, than all other forms of protection when in fact the evidence shows a broad spectrum of prices for competing services and systems, extending beyond those for CSPS at both ends, and when in many instances where prices for the latter may be higher the net cost to subscribers is the same or essentially the same when insurance discounts are considered. These findings by the lower court, premised upon the Government's contention that *average* prices charged for local burglar alarm service are lower than those for accredited central station service in that one field of risk (even though non-defendant alarm company witnesses testified that such comparisons of average charges are not meaningful and the Government concedes that other forms of protection may be more costly), are not supported by the evidence and can not sustain the court's erroneous conclusion that accredited central station services are therefore "monetarily a new class" and subscribers to them are "moving into the class of the rich." (pp. 91-100)

And there is no reliable evidence on the record as a whole to support the Government's "different classes of customers" argument (urged solely as to burglar alarm service, the contention being that local alarms are limited

to subscribers with inventories only under $15,000 while accredited central stations service only those with inventories above that figure), the evidence in fact demonstrating the most substantial (though concededly not 100%[6]) overlap in customers solicited and served by central stations and other forms of protection. (pp. 100-08)

Finally, there is no reliable evidence to support the Government's contention and the District Court's finding that shifts to insurance-approved central station services outnumber those from such services (a finding which was the sole basis for the court's conclusion that customers recognize a difference in markets), and in fact the record demonstrates that the occasional evidence of shifting (not even purportedly based upon any meaningful statistical inquiry) results not from the subscriber's changing from one market to another but rather from his alarm company's commencing central station service and connecting the subscriber's existing system to its new station. (pp. 108-16)

Even if the Government's catalog of alleged differences could be given full credence, however, they would provide no valid basis for the District Court's accepting them as the basis for concluding that accredited central station services constitute a market by themselves. *Cellophane* demonstrates that even markedly greater differences in characteristics, in quality and customer preferences, and in prices are not dispositive. Rather the test, of which the court below lost sight, is whether differentiated substitutes are in the minds of customers so distinctive or disparate, considering the composite of all those factors to which customers react (including characteristics, quality and price), as to preclude reasonable interchangeability and cross-elasticity of demand. (pp. 67-68, 89-91, 99-100, 105-11)

6. Defendants have never urged that all other forms of protection are effectively competitive with accredited CSPS in all instances and as to every customer or potential customer or that every dollar of business won by these competing forms of protection was at the expense of central station services. Rather the evidence shows that significant portions of the business of furnishing these many other forms of protection compete in the same market with accredited central station services and preclude any alleged power to control price or competition in such services.

The record is replete with evidence of the requisite interchangeability and cross-elasticity of demand, which the court below chose to ignore because of its erroneous view that Clayton Act market standards have displaced that of *Cellophane*. Non-defendant alarm company witnesses testified that there is effective competition between accredited central station services and unaccredited central station, proprietary, direct connected, auxiliary, local, telephone answering and watchman services and systems. Concerns selling these other forms of protection regularly solicit the same prospects, winning some and losing some. The alarm company witnesses testified that establishments similarly situated in all respects pertinent to a choice of protection consider and use these different forms of protection. Defendants introduced customer evidence and surveys which demonstrate substantial interchangeability. (pp. 119-21, Appendix B)

Further, there is abundant proof of marked price sensitivity and response between accredited central station services and the other forms of protection. General statistical data based upon contemporaneous business records and the testimony of non-defendant alarm company witness after witness attest to these facts: to avoid loss of business, accredited central stations and those furnishing other forms of protection respond to each other's prices and price changes; those furnishing competitive protection can and do respond to price cuts by accredited central stations with price cuts of their own; business is lost or gained as a result of price; accredited central stations have been unable to sell to or retain the business of particular subscribers because of prices and as their prices were reduced, business became available to them or those other competitors. Such evidence of cross-elasticity here more than meets the criteria set forth by the dissenting members of this Court in *Cellophane* and by the critics of the result reached there, as illustrated by such testimony as the following by witnesses from non-defendant alarm companies furnishing other electric protection services who explained that in competition with accredited central stations "* * * we are

forced in terms of competing to try to evaluate what these subscribers' needs are insurancewise, and try to project what his premium may be, try to project what discount will be available through other companies and what discount will be available through us, and if necessary, to arrange our prices accordingly to bring us in the competition picture, but in doing this, we have to make our prices in many cases very, very low, * * *'' and that accredited central stations have to reduce their prices in competition with those other protection services. (pp. 121-31)

On these facts, the limitation of the market to accredited central station services alone is unreasonable and cannot be sustained. All of the Government's evidence having been introduced and its sole market contentions having been erroneously adopted *in toto,* the complaint should be dismissed.

D. Even accepting for the sake of argument the erroneous market definition of the Government and the District Court, the percentages ascribed to defendants do not fit or coincide with that market. The revenue figures used are derived in substantial part from services not insurance-approved. But revenues from the same kind of services furnished by unaccredited central stations are, without any proper basis, erroneously excluded so that defendants' percentages are overstated in relation to the full revenue actually earned for all like services. (pp. 131-35)

II. Even if the District Court had relied upon a properly defined market and percentages, it was error to presume monopoly power on the basis of mere market percentages. Economists uniformly reject market share alone as proving monopoly power and insist upon additional evidence of market structure and performance. One such factor is ease of entry and actual entry experience. Non-defendant accredited CSPS concerns have increased more than fivefold between 1945 and 1963, such new entries occurring on an accelerated basis and the great bulk of them in cities where defendants had established central stations. They have steadily increased their volume and, more sig-

nificantly, are making steady inroads into defendants' percentages of the defined market, which in great part represent the hold-over or residual effects of their pioneering a business in which subscribers seldom leave their suppliers. Moreover, total accredited central station revenues are rapidly expanding and non-defendants have been taking increasingly large shares of the new business each year (*e.g.*, from 18.1% of the new business in 1958 to 28.3% in 1961). Further, ADT's profits, which are not large by any standard, were in no way shown to be larger than those of competitors or comparable businesses. Finally, there is copious evidence, introduced by the Government, of ADT's price reductions necessitated by the vigorous competition of other accredited central station concerns. On all the evidence here, it has not been shown that defendants have monopoly power. (pp. 136-47)

III. On the basis of its erroneous market definition and percentages, the District Court, after the trial, shifted to the defendants the burden of proving they had not monopolized, attempted to monopolize, or conspired either to monopolize or in restraint of trade. While claiming to create only a rebuttable presumption, the court declared that monopoly is "to a moral certainty" born only of conduct sufficient to establish the additional element of deliberateness essential to criminal monopolization. In fact, in requiring defendants to establish that their asserted market position is "attributable *exclusively* to [their] skill, efficiency, foresight, or like affirmatively laudable business conduct" (OL 3, R. 762), the court below effectively created an irrebuttable presumption tantamount to a new *per se* rule outlawing the mere status of monopoly, wtihout regard to any accompanying conduct or behavior. Such a criminal presumption is contrary to sound jurisprudence inasmuch as there is no necessary or reasonable relationship between such status and the behavior which is alone proscribed by Section 2. If mere share of the market, without more, is to be outlawed, that revolutionary change must be ordered by Congress. And even if any presumption akin to that

created by the District Court here could ever have validity as a matter of law, economics or sound public policy, clearly it could not be applied where invoked upon the basis of share of a market which erroneously excludes any consideration of the impact of substitute product or service competition. (pp. 148-57)

IV. Numerous other findings of fact and ultimate conclusions of the District Court were clearly erroneous and require reversal. Of varied and wide-ranging character and impact, they are not susceptible to concise summarization but appear at pages 157-60 herein and in the briefs of the other defendants.

V. Similarly, discussion of the overall conduct of the proceedings below, marked by the District Court's prejudgment and denial of the fair trial essential to due process, is set forth in the Grinnell brief.

VI. The decree entered by the District Court, enjoining defendants in the broad language of Sections 1 and 2 of the Sherman Act, is a general prohibition against all possible breaches of the law. Coupled with the court's failure to make evidentiary rulings and adequate findings as to agreements or acts deemed unlawful, the decree leaves defendants without knowledge of what is proscribed and places their whole conduct at the peril of a summons for contempt. The decree further enjoins defendants from employing a non-defendant, the chairman of ADT's board of directors. This punitive prohibition is wholly contrary to fundamental principles of fairness, particularly when the non-defendant individual not only was never apprised of any charges against him but neither the findings nor the record suggest any wrongdoing on his part. (pp. 161-64)

VII. To eliminate a multiplicity of briefs, defendants agreed to state their position with respect to the Government's appeal directed to obtaining additional relief. We have been able to do so solely in terms of contentions raised by the Government below and in part reiterated in its Jurisdictional Statement. While we have dealt with

those previous contentions at some length in this brief (see pp. 164-88), because the Government indicated in its Statement an intention to reserve the right to seek remedies not heretofore pursued we respectfully submit that a summary of our ultimate position should properly await receipt of the Government's brief.

ARGUMENT

I

THE DISTRICT COURT'S PRESUMPTIONS OF MONOPOLY POWER AND MONOPOLIZATION CANNOT BE SUSTAINED BECAUSE THEY ARE BASED SOLELY UPON PATENTLY INVALID MARKET DEFINITIONS AND PERCENTAGES.

A. The Basic Rationale of the District Court

The District Court presumed monopoly power and monopolization solely upon the basis of asserted percentages of an allegedly relevant market computed jointly for the alarm company defendants, ADT, Holmes and AFA. Judge Wyzanski announced after the trial that he had proceeded on the "principle that once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of Section 2."[7] (R. 746) Ignoring the compelling evidence to the contrary, he adopted without a single change exactly the same market definition and percentages urged by the Government:

7. Judge Wyzanski also declared, "One indirect method to prove the requisite [monopoly] power is to show defendant's occupancy of an overwhelming (but not mathematically definable) percentage of the market, unless that position,—or, as it is called, 'share of the market',—is shown by the supposed monopolist to be attributable *exclusively* to his skill, efficiency, foresight, or like affirmatively laudable business conduct. Unless he maintains the burden of proving himself within the exception, the occupant in the dominant position stands condemned." (OL 2-3, R. 762)

"* * * [F]or purposes of the antitrust laws there exists a specific, separate, identifiable, recognized market limited to accredited central service protective systems operated by largely automatic devices. * * *

"* * * [A]s the complaint alleges, 'the business of supplying and installing protection devices on the premises of subscribers, maintaining such devices and furnishing to subscribers protection from fire, burglary, or other hazards, through central stations accredited for such service by insurance inspecting and rating organizations is a trade or industry which constitutes part of the commerce among the several states * * * regulated by Congress by virtue of the Sherman Act, * * *

"[D]uring the period 1957-61 defendant alarm companies' share of the total national accredited CSPS market ranged from 87% to 91%; and ADT and Holmes had 87% to 90% of so much of the central station burglar alarm business as was 'certificated' by all underwriters' laboratories." (FF 36, 43-44, R. 754-56).

The decisive question where monopoly is in issue is whether power to control price or exclude competitors exists. Nowhere did the District Court find that the alarm company defendants have that degree of market power. Contrary to the District Court's mechanistic approach, this Court has long accepted the fact that market percentage, while important, is not by itself conclusive. See *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 527-28 (1947). Here we submit the market percentages found below can not be sustained. It is therefore significant—in fact fatal to the Government's monopolization charges—that Judge Wyzanski was compelled to infer monopoly power solely from invalid market percentages and, contrary to other monopolization cases, could find no evidence that defend-

ants had the requisite power to control prices or exclude competitors.[8]

Indeed, the only findings bearing upon those classic and essential indicia of monopoly power undermine and immediately make suspect the market determination and inference of such power. Thus, while understating to the prejudice of defendants the full import of the evidence, the court below concluded:

> "* * * [T]here is no persuasive evidence that any particular prospective entrant has been unable to begin operations, or that any specific CSPS firm has failed or been driven out of business * * *.
>
> "Defendant alarm companies do not have unfettered power to control the price of their services. Even where they have no competition from other CSPS companies, they have not always been able to receive the standard they have set for themselves, the so called 'Minimum Basic Rates' * * * or annual service charges. This is due to the fringe competition of other alarm or watchman services." (FF 45-46, R. 756)

In this point it is urged that the District Court's application of improper legal tests and its clearly erroneous findings in connection with its conclusion that the defendants have the monopoly power essential to a finding of monopolization compel reversal of the judgment below. And upon such reversal the Government's charges should be dismissed[9] for failure of proof inasmuch as all of its

8. Even Judge Wyzanski has heretofore been unwilling to rely upon high market share alone as establishing monopoly power. In *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 343 (D. Mass. 1953), *aff'd per curiam*, 341 U. S. 521 (1954), he said: "In estimating defendant's strength, this Court gives some weight to the 75 plus percentage of the shoe machinery market which United serves. But the Court considers other factors as well." Here he considered no other factors.

9. At the conclusion of the Government's less than hour-long introduction of all its evidence "in bulk", the defendants moved to dismiss for failure of proof. (R. 346-47).

evidence was placed upon the record without limitation and the court below adopted *in toto* its contentions as to the relevant market, the defendants' percentages thereof, and the resulting inference of monopoly power.

B. The Erroneous Geographic Market Definition

1. Conceding that many cities are necessarily "natural monopoly" markets, the Government was forced to characterize the relevant market as national.

To urge that defendants' combined market share was "dominant," the Government had to assert the existence of a nationwide market. The only local market share evidence for cities with more than one accredited central station came from two Government witnesses who testified that in competition with ADT they had, respectively, in Dallas "70 percent" and in Dayton "most" of that business.[10] The Government thus took full advantage of the fact that in 92 of the 115 cities where ADT operates it has no accredited central station competition (FF 7, R. 748) and that, even by the Government's standards, many of these cities can not sustain more than one central station.[11]

10. GX 318, R. 2415; GX 355, R. 3099, Vol. 2, p. 29, R. 331-33

11. Thus, of the 92 cities where ADT has no accredited central station competition, the Government has effectively conceded that many are "natural monopoly" markets, unable to support more than one central station. While the Government has vacillated throughout the proceedings below as to the number of such cities able to support another station, apparently it now argues there are 48. (GJS, p. 9) The ground asserted for this conclusion is the arbitrary standard articulated by the Government alone, without any evidentiary support, that every city in which ADT has at least $250,000 of central station annual revenue can sustain another accredited station, each such new station to be given $125,000 of ADT's revenue base. Thus the Government urged below that "a central station protection operation normally does not reach a financial break-even point until such time as the central station has acquired subscribers paying approximately $125,000 in service charges." (GTB, p. 9) In fact, central station break-even points vary widely depending upon the combination of differing factors unique to each city or locality. As developed in greater

Avoiding any evidence permitting market share analysis on a local basis, the Government instead introduced total dollar revenue figures and total numbers of subscribers for each accredited CSPS concern without regard to geographic location or source. Consequently, for those concerns which, like the defendant alarm companies, operate accredited central stations in more than one city the figures were not broken down on an individual city basis, and the record does not permit computation of local market shares.

2. *On the erroneous ground that defendants are engaged in multi-market operations, the District Court adopted the Government's national market contentions.*

Delimitation of the relevant geographic market as national is one of the series of fatal errors, which, singly and cumulatively, destroy the market definition and percentages accepted below as the sole basis for inferring monopoly power, from which monopolization was presumed. The court declared:

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detail hereafter at pp. 28-29, there are marked variations from one city and station to another dependent upon the character of the available clientele, the "mix" of the various types of differing central station services rendered, different costs, and different price levels established by competition. The record demonstrates that there is no single break-even level and that $125,000 is unrealistic since actual break-even experience has been widely divergent and break-even points have been attained, for example, only at revenue totals of $180,000, $235,000 and $450,000. (*E.g.*, R. 565-66; GX 289, R. 2185, 327; GX 359, R. 3168, 331-33). Accredited central station witnesses called by the Government summarized the situation with such testimony as this: "Q. What volume do you feel is necessary in order to operate profitably? * * * A. This is also determined by the amount of equipment used, the type of central station, location, owning the building, not owning the building, radio patrol cars and non-radio patrol cars, the type of vehicles you have. So each central station would almost have a different category of volume and it couldn't be defined as one central station, one locality, to do a certain volume of business before it could become profitable compared to another one." (GX 338, pp. 33-34; R. 331-33) "* * * [I]t would depend upon the size of the city and the circumstances, * * *" (GX 356, p. 30; see also GX 347, pp. 30-31; GX 357, p. 35, R. 331-33)

> "* * * [G]eographically, because of the very nature of those automatic devices and the services related thereto, and the patterns in which that industry has developed, the market has a national interstate-commerce character. It is not merely a congeries of segregated local or city markets. * * *" (FF 37-38, R. 754)

The court's rationalization for the national market conclusion is the admitted fact that defendants, particularly ADT, furnish such services in more than one city. While seeming to state a variety of facts, the findings are purely superficial and the only basis stated for the court's conclusion is a series of variations upon the sole theme of defendants' multi-market operations.[12] Ultimately clarifying his earlier reference to "the patterns in which the industry has developed" (FF 37, R. 754), Judge Wyzanski articulated the real basis for his determination in simple and revealing terms:

> "The existence of a national market is underlined by defendants' own national pattern of business, * * * with its constant use of interstate commerce. * * * Grinnell and the affiliated companies included in its balance sheet do not pretend to have a purely local status. * * *" (FF 39, 41, R. 755)

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12. The court adverted to *defendants'* asserted "national planning," *defendants'* "lapsed agreements covering activities in many states", and *defendants'* "national schedules of prices, rates and terms." (FF 40, R. 755) This same finding refers to "reduction of rates by national insurers." Any implication that CSPS rates are reduced on some national basis is wholly at odds with the commercial facts and the record. As with the competing forms of protection, the only reductions available are in insurance premium rates. Those rates are, of course, not uniform nationally but vary from one area to another in terms of local experience, conditions, and competition. (*E.g.*, GX 317, R. 2382-85, 2391, 331-32) And, as outlined in some detail hereafter at pp. 30-31, not even the insurance premium discount percentages or credits available to subscribers to some of the central station services are the same from one area to another.

The fact that a defendant operates in more than one city or allegedly "uses interstate commerce," however, does not make the relevant market national, particularly when, as the court itself found (FF 10-11, R. 749), the great bulk of the accredited CSPS concerns operate in but one city or locality.[13]

3. *The "commercial realities" of central station services disprove any national market definition.*

As this Court stated in *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 336-37 (1962), where national or multi-market shoe retailers were involved,

> "The geographic market selected must * * * both 'correspond to the commercial realities' of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area."

Here the "commercial realities" are at war with any conclusion that either central station services (accredited or not) or the other competing non-central station enterprises fit any national market definition. In fact, so singly directed are the market realities that no witness or document characterized any of the central station services as anything but geographically circumscribed, local endeavors. Indeed, the record contains not an iota of support for the conclusion that market shares or the power to control price or exclude competition can be determined on a national basis. Facts undisputed by the parties and adopted in substantial part by the lower court compel the conclusion that the central station business (both accredited and non-accredited) is local and competition and market shares can be

13. FF 7-10, R. 748-54; D75(b), R. 4507-08, 497, 595-96.

measured only at that level,[14] whether accredited central station services are to be considered alone or in combination with other effectively competing forms of protection.

Subscribers to protection services, whether accredited CSPS or other competing services, can turn only to concerns offering such services in their immediate locality or city. (FF 12, R. 749) The character of these services precludes their being offered or available on any broader geographic basis. All typically require locally based personnel able to reach subscribers quickly in connection with a variety of functions, including solicitation, installation, maintenance, repair, guard, emergency and others, some or all of which are common to each type of protection service.[15]

a. The effective radius of accredited central station operation is not more than twenty-five miles.

Focusing more specifically upon CSPS, as the court below found, "A central station, in its normal daily service operations, is physically independent of any other central service station. * * * [I]ts service is summoned, responds, and is consummated usually within a twenty-five mile radius." (FF 4, R. 747) This is true, the court concluded, because "alerted CSPS employees must promptly reach the scene of the alarm" and "high leased-line costs make

14. It is, of course, orthodox economic doctrine that "market share" has meaning only if related to a commercially appropriate geographic area. For example, economists point out that Census-derived concentration ratios (combined market shares for the four, eight or twenty largest sellers of a product), which represent national totals, are of no utility where the market is local or regional. It has been observed that "The basic Commerce Department data contain no adjustment for the differing geographic compositions of markets, and hence only in cases where the market is national in scope are these concentration ratios meaningful. Where there are distinct local or regional markets which bind the activities of buyers or sellers, the relevant concentration ratio is the one for each particular local or regional market." Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis*, p. 29.

15. FF 2-4, 6-10, 38, 40, R. 747-49, 754-55

it expensive to transmit signals for a great distance." (FF 3, R. 747)

Moreover, for subscribers interested in insurance premium reductions, accreditation requirements limit the availability of some of these services to far less than 25 miles from the central station. "Certification" of a central station burglar protection system at a subscriber's premises can be obtained only if guards can respond within a specified period of minutes. Consequently, in concentrated metropolitan areas population density and traffic congestion effectively limit that type of accredited CSPS to as little as three or four miles of the central station.[16] As Government witnesses testified, "Miles is not necessarily the criterion. It is the accessibility through traffic and through the highways provided." (GX 326, p. 117, R. 331-32) These factors so limit the geographic reach of a central station that in large, densely populated cities a given company may operate more than one station, as ADT does in New York and Chicago. (GX 222, R. 2033-38, 327)

The geographical limitations imposed upon central station service concerns by the necessity of prompt response are attributable to purely economic considerations, too. It costs substantially more to service a customer at the outer

16. Central station witnesses testified that they could render certificated burglar CSPS only 3 to 5 miles from the central station because of the guard response times required by the underwriters. On the other hand, they testified that the more liberal time requirements permissible for various approved fire protection central station services allowed the furnishing of such services to subscribers 10 to 15 miles from the same station. (*E.g.*, R. 356-58; GX 320, R. 2463; GX 326, R. 2564-65, 2592-93; GX 329, R. 2668, 331-35) The fire protection requirements defined in the Standard of the National Board of Fire Underwriters for Central Station Watchman, Fire Alarm and Supervisory Service (NBFU No. 71) dictate a running time from central station to the subscriber's premises of not more than one-half hour. (GX 317, pp. 63-64, R. 2360, 331-32; GX 1, R. 793, 327) Certificated burglar central station service, on the other hand, requires guard response averaging not more than 10 or 15 minutes, depending upon the class of certificate sought, and Underwriters Laboratories, Inc., which establishes these standards, states, "Experience indicates a *maximum* distance of about 5½ [and 7½] miles with automobile runner service." (GX 3, R. 855-56, 862-63, 327)

limits of the feasible service range than one located in close proximity to the central station. Such items as leased line costs and the time-cost expenditures for personnel who must respond to signals or perform inspecting and maintenance at the subscribers' premises increase directly with distance. (*E.g.*, GX 357, pp. 66-68, R. 331-33) Therefore, as the Government pointed out (GTB, p. 9), a central station cannot break even unless it has a sufficient number of customers located in fairly close proximity to one another and the station. The court below expressly found that the central station business "involves customer concentration within specific areas" (FF 3, R. 747), and then inexplicably ignored this conceded fact in concluding that the relevant market was nationwide.

b. There are significant variations in the cost of furnishing central station services from one locality to another.

The costs of providing central station services vary radically from one city to another. Leased line costs vary from one local telephone system to another (in some cities central station companies can own their own lines connecting subscribers to their stations); the most substantial part of CSPS operating expenses, labor costs (encompassing installation, regular maintenance and inspecting, and repair and replacement of equipment on subscribers' premises, together with the 24-hour a day manning of central stations with monitoring, maintenance and guard or runner personnel) differ most significantly from station to station with the marked variances in basic and other labor rates which occur from city to city and region to region across the country; costs also differ from one station to another dependent upon such highly localized considerations as the subscriber mix (the relative proportion of business attributable to each of the various types of central station services) and the pattern of installation and service problems unique to each area; and, finally, significant cost differences from one locality to another result from such facts

as the imposition by some cities of franchise levies upon central station services of as much as 5% of total gross revenue realized.[17]

c. Price levels for central station services vary markedly from one locality to another.

Such cost differentials as well as variations from one city to another in the intensity of competition between central station concerns (both accredited and unaccredited) and between them and other protection services and systems produce significant variations in price levels not only for accredited CSPS but for the other services as well.[18] Thus, while ADT as a simple means of administrative facility internally projects uniform target price lists or guides for all cities where it operates,[19] the cost and competitive factors unique to each city compel it to sell its central station services at almost as many different price levels as the number of cities it serves, and those price levels have varied by as much as approximately 60% from one city to another.[20] The Government does not contest the fact of local variations in central station service prices, conceding, for example, that burglar CSPS average monthly charges "range from $20 to $30." (GTB, p. 199)

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17. R. 564-66, 571-73, 554-55, 558-59, 618-19, 353-54; GX 339, R. 2898; GX 329, R. 2677-78, 331-35; GX 164, R. 1599-1602, 327.

18. To illustrate, local burglar alarm service rates average $5 a month in Newark, N. J., $7.50 a month in Cleveland, Ohio, $9 a month in San Francisco, Cal., $10 a month in Chicago, Ill., and so on. (*E.g.*, R. 381; GX 331, R. 2783; GX 343, p. 67, R. 331-35; W2a, R. 4639-40; W8a, R. 4791; W9a, R. 4821, 497, 595-96).

19. FF 46, R. 756; R. 398-401, 411, 555-56, 558, 612-13; GX 313, R. 2291, 331.

20. FF 46, R. 756; GX 222, R. 2033-38, 327; R. 555-56, 612-13, 558-59, 438-41, 454-55.

d. Underwriter approval and discounts are local in character.

Central stations are approved or accredited by the insurance underwriting authorities only on a single station basis.[21] Consequently, CSPS concerns with more than one station do not obtain accreditation collectively for all their stations (or indeed even for all services rendered by the particular station) when one of their stations is thus recognized. Accreditation, therefore, even if pursuant in part to standards established by a national agency, is a wholly local event. In fact, while national entities like Underwriters Laboratories, Inc. ("UL") and the National Board of Fire Underwriters ("NBFU") establish some of the technical standards for central stations and the systems placed on subscribers' premises,[22] contrary to the District Court's finding "of inspection [and] certification * * * by national insurers" (FF 40, R. 755), those functions are performed by others. Local underwriters' agencies, like the Insurance Rating Bureau of the District of Columbia and the Baltimore Inspection & Rating Bureau, initially and regularly thereafter inspect the subscriber's systems where insurance premium discounts are granted.[23] And the certificates for burglar insurance discounts are issued by the local central station or other alarm company furnishing the service,[24] not "by national insurers."

Other than some of the technical standards established by UL and NBFU (which may be applied wholly or in part in their particular areas by the local or state rating agencies), the jurisdiction of the underwriters' rating and in-

21. GX 1, R. 789-812, 327; GX 3, R. 843-76, 327; D 75(b), R. 4507-08, 496

22. GX 1, R. 789-812, 327; GX 3, R. 843-76, 327; R. 523

23. *E.g.*, GX 317, R. 2357-59, 2362, 331-32; R. 522-23

24. *E.g.*, GX 352, R. 3071, 331-32. (The Government advised the District Court: "* * * [U]pon approval by Underwriters Laboratories, Inc. to conduct accredited central station burglar alarm service, each central station protection company is issued serially-numbered certificate forms. * * * The protection companies are responsible for each certificate issued, * * *") (GTB, p. 29)

spection agencies is not national but is confined to state and local areas.[25] In the fire insurance field, these agencies establish eligibility requirements which vary from one locality to another as do the suggested discounts or credits, which they determine (the Government's own witnesses testified, "The local rating bureau having jurisdiction has the right to establish the credits. * * *")[26]

In the burglary insurance field, while the National Bureau of Casualty Underwriters ("NBCU") publishes insurance premium discount rates for central station and other alarm services, from state to state the discount allowed will vary plus or minus 25% from the central station discount rates established by the Bureau, as its Burglary Division Manager testified when called by the Government. Even those insurance companies which apply the Bureau's discount percentages in one state do not apply them in all others.[27]

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25. GX 317, R. 2382; GX 318, R. 2396; GX 320, R. 2434-35; GX 325, p. 15; GX 326, R. 2546-47; GX 330, R. 2708-09; GX 334, R. 2842; GX 339, pp. 4-5; GX 341, pp. 3-4; GX 342, pp. 22-24; GX 343, p. 16; GX 345, p. 6; GX 346, pp. 12-13; GX 347, pp. 12-13, R. 331-35; R. 405-06, 485, 497-99, 523, 565.

26. GX 317, R. 2357, 2360-61, 2382; GX 318, R. 2395-96; GX 320, R. 2472; GX 326, R. 2556; GX 337, R. 2881; GX 343, p. 77, R. 331-35; R. 485, 497-99, 565. The Government concedes these facts: "These [state and local] organizations establish standards for the installation maintenance and servicing of central station fire protection systems, approve or disapprove central station protection operations, and conduct periodic inspections and field tests to insure that their standards are being maintained. * * * In addition, these Bureaus develop rates and file rate schedules with state insurance Commissions in each State of the United States. These rate schedules include discounts granted to users of central station protection service." (GTB, p. 13) And again: "The Rating Bureau [of the District of Columbia], in connection with its rate making activities, also establishes insurance premium discounts to be granted insureds utilizing fire protection service." (GTB, p. 192)

27. GX 346, R. 2992-95, 331-32.

e. Central station operational routines are purely localized.

Moreover, contrary to the implications of Judge Wyzanski's finding 4,[28] CSPS salesmen solicit business purely on a local basis. CSPS installers place equipment and devices upon subscribers' premises only locally; CSPS maintenance personnel regularly check such equipment only locally; CSPS repairmen fix and replace such equipment only locally; CSPS monitoring and guard personnel perform their duties only locally. "Reports about the system" of any subscriber by any of these employees do in fact "have a purely local, individualized character, origin and destination." And these facts are true not only of other accredited CSPS concerns, since as the court below found, the bulk of them offer central station service in only one city or locality (FF 10, R. 749), but of the defendants as well.[29]

f. All the significant factual criteria compel a local market definition.

These are the facts—the commercial, economic and competitive realities—which disprove any asserted national market calculus and command instead measurement of market power and position in the only appropriate geographic area, the local markets comprised of the cities where central stations operate in competition among themselves and/or with other local protection systems and services. These are the facts which prompted defendants' expert witness, Dr. Jesse W. Markham, prominent economic consultant,

28. "* * * This is not to imply that the ultimate supervision is *not* nationally directed; nor that the system of operations, nor that the equipment used, nor the checking of equipment, nor the reports about the system have a purely local individualized character, origin, or destination. On the contrary, the enterprise in appearance and reality, in financing, selling, advertising, purchasing of equipment, processes of management, and over-all planning is national; * * *" (FF 4, R. 747) (Court's emphasis)

29. R. 518-19, 550, 387, 412-13, 415, 418-20, 447-56, 465-66, 545, 615-16.

author and former Chief Economist for the Federal Trade Commission, to conclude that the alarm company defendants' position must be measured in the "various local markets"—the "metropolitan markets"—and that their market power certainly must vary from one such local market to another. (R. 655, 657-58)

4. The District Court's own findings contradict its national market conclusion.

In his ultimate finding of the geographic limits of the market, Judge Wyzanski ignored or brushed aside these facts. At the same time, however, his other findings and conclusions are totally inconsistent with his adoption of the Government's national market contentions. Thus, he expressly based his determination as to whether particular CSPS concerns had competition or not solely in terms of whether there were other central stations *in the same city*. (FF 11, R. 749) And he acknowledged that, in addition to "physical obstacles", there are present considerations of "business advantage, competitive conditions, and prospect of favorable profits" which "now stand athwart the geographical expansion of central station coverage." (FF 3, R. 747) Moreover, he conceded that "there may well be local markets of limited territorial area, or city markets, which in other litigation might be found in themselves to constitute, for purposes of the antitrust laws, definable, separate markets. * * *" (FF 38, R. 754)

What basis there could be for thus recognizing the real geographic market dimensions "in other litigation" and not here the court below failed to state. We submit there is none and that the best that can be said for Judge Wyzanski's insupportable analysis is that he confused defendants' alleged conduct of business in interstate commerce and the fact that CSPS may be a "part of interstate commerce" with an "interstate" or national geographic definition of the relevant market.[30]

30. *Cf.*, FF 26-27, 37-39, and 42-43, R. 752-56, for repeated references in market findings to "interstate commerce", "interstate commerce market" and "interstate market".

5. *On all the facts, the controlling authorities invalidate the District Court's national market definition.*

Whatever the antitrust statute in question, this Court has uniformly announced that market definitions must conform to competitive realities. See, *e.g., United States* v. *Continental Can Co.*, 378 U. S. 441, 457 (1964). The basic postulate in determining the limits of a defendant's geographic market is normal customer-supplier practice, *i.e.*, in what area can customers who ordinarily deal with the defendant turn to other suppliers and from what area do other suppliers compete with the defendant for the business of such customers:

> "It is clear, of course, that the 'line of commerce' affected need not be nationwide, at least where the purchasers cannot, as a practical matter, turn to suppliers outside their own area." *Standard Oil Co. of Cal.* v. *United States,* 337 U. S. 293, 295 n. 5 (1949).

Thus, as this Court has declared, inquiry must be directed to "the geographic structure of supplier-customer relations," and there must be "careful selection of the market area in which the seller operates *and to which the purchaser can practicably turn for supplies.*"[31] *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 357, 359 (1963); see also, *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 327 (1961).

When a customer ordinarily does not leave his particular locality to buy a product (here service), and when, as here, the sellers cannot furnish or deliver their services from outside of that locality, there is only a local geographic market. The teachings of this Court in cases under Section 2 of the Sherman Act so demonstrate. *United States* v. *Griffith,* 334 U. S. 100 (1948). *Schine Chain Theatres, Inc.* v. *United States,* 334 U. S. 110 (1948); *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594 (1953).

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31. Court's emphasis.

That the seller's product is sold nationally or at many locations throughout the country is not dispositive. The decisive element is the area within which customers normally, or must, turn to procure the product or service and the location of competing suppliers. The A & P grocery chain is nationwide, but customers turn only to the stores in their neighborhood—not those in some other city or locality. A & P's market is therefore not unitary and national, but instead it sells in numerous local markets,[32] and its competitive impact must properly be measured there even though its national scope may bear upon that impact in each local market.[33] In defining the geographic dimensions of a market these are the only proper considerations, sound as a matter of law, economics and policy:

> "The first requisite to dealing with relative size is to measure it: this means properly delimiting the market and getting a usable measure of the market share of the dominant firms or firm. * * * [T]he delimitation of a market [is] in terms of products and of geographic * * * dimensions. * * * In the geographic dimension, the geographic structure of supplier-customer relations must be traced out." Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis*, pp. 101-102.

The courts and the Federal Trade Commission have uniformly regarded commercial contexts akin to that here as requiring a local market definition. To cite but one example, the Commission measured competitive effect in the dairy industry in terms of local market percentages notwithstanding the fact that the respondent and others sold on a national basis:

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32. A former FTC Chairman, while holding that office stated: "* * * [I]n the food industry it might be said there is no meaningful national market, but only regional or local areas of effective competition." October 19, 1959 Speech by Earl W. Kintner to the National Association of Food Chains.

33. *Cf., Schine Chain, supra.*

> "As interpreted by the courts, this determination must be made on the basis of economic reality. * * * Included among these considerations [which lead to the conclusion that the numerous local markets constitute the relevant sections of the country], * * * are the limited area which can be covered by route trucks delivering to customers, differing local health and other regulations, and different price considerations unique to different urban centers." (*Foremost Dairies, Inc.*, 60 F. T. C. 944, 1061 (1962))

Notwithstanding the necessity of its relying upon national figures in order to argue monopoly, the Government itself here in fact recognized the local nature of the relevant market.[34] For example, it advised the court below that "the geographic area in which the defendants' power shall be measured must be limited to those cities throughout the entire United States which are of sufficient size to support an approved central station protection service operation." (GTB, p. 174). Further, it sought relief in the form of divestiture of assets by ADT to the extent "necessary to assure competition in central station electric protection service *on the local level.*" (R. 39) Indeed, the Government expressly declared that cities are the relevant geographic market for central station services, urging that

34. The Solicitor General and the Department of Justice have in other cases conceded that market realities like those here dictate a local geographic market definition if any meaningful measurement of competitive impact or market power is to be achieved. For example, they have stated: "A market may be national in the sense that all sellers are seeking to sell to any potential buyers and all buyers to buy from any seller, unaffected by location, as might be true of locomotives or large commercial aircraft. That would be a true national market like a national stock or grain exchange. With many other products, however, especially consumer goods, the sellers are not equally able and willing to sell in every area; the buyers have established local preferences and limited range; and sometimes prices will vary from place to place. In such an industry the extent of competition between any two companies * * * will vary greatly from place to place because there is not a true national market." Government's Jurisdictional Statement, p. 18, *United States* v. *Pabst Brewing Co.*, No. 404, October Term, 1965.

acquisitions be evaluated in terms of competition "existing in a city—the relevant geographic market." (GPB, p. 8)

It follows from all the facts that the market in which defendants' alleged monopoly power must be measured can properly be defined only in local terms, not national as erroneously concluded by the District Court. The findings of monopoly inferred solely from that erroneous definition therefore must fall. The Government, having failed to prove the geographic dimensions of the market it urged and having offered no alternative evidence or contention, must suffer dismissal of its charges.

C. The Erroneous Product or Service Market Definition

1. Rejecting Cellophane, the District Court substituted merger case market criteria wholly inapposite for determination of the power to control price or exclude competition.

Throughout the trial, counsel were admonished that the precepts set forth by this Court in the landmark *Cellophane*[35] case were considered by the District Court no longer to be controlling.[36] For example, the Court stated:

35. *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377 (1956).

36. In *Walker Process Equipment, Inc.* v. *Food Machinery Chemical Corp.*, —— U. S. ——, 34 Law Week 4037 (12/7/65), this Court has this Term reiterated that where there is effective competition between differentiated or substitute products the relevant market for purposes of testing monopoly cannot be limited to only one of those products even where it is patented: "To establish monopolization or attempt to monopolize a part of trade or commerce under §2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition. It may be that the device—knee action swing diffusers—used in sewage treatment systems does not comprise a relevant market. There may be effective substitutes for the device which do not infringe the patent. This is a matter of proof, as is the amount of damages suffered by Walker."

"You are really trying to argue, if I understand you correctly, the same kind of thesis which was unsuccessfully [sic] argued in the duPont Cellophane case, * * * I just don't think there is anything to that as a matter of law * * * I think the notion that the defendants have that cross-elasticity of demand, such as in the case of cellophane cigar wrappers, went out of the effective vocabulary of antitrust defendants, [and] is also an aberration. * * * I am quite sure that in the long run the Supreme Court of the United States is going to take about as narrow a view of the market as the circumstances here permit." (R. 393, 544).

A colloquy between Judge Wyzanski and defendants' expert, Dr. Markham (who testified that the evidence here demonstrates that in determining whether the defendant alarm companies have the power to control price or exclude competition analysis can not properly be limited just to accredited CSPS—R. 650-65), highlights the Judge's belief that this Court will ultimately hold *Cellophane* no longer controlling:

"The Witness: Are you asking me if in my opinion, just as a horseback opinion, wrapped cigars compete with unwrapped cigars?

"The Court: Yes, don't they?

"The Witness: I would certainly say at the margin they must compete intensely. Whether they compete throughout I am not prepared to say.

"The Court: And the fact that they do compete doesn't mean that you can't have market power with respect to wrapped cigars and the market is the market for wrapped cigars?

"The Witness: Well, I would argue that you would need to modify any statistics that you would build on the basis of wrapped cigars. * * * That is, if I have a firm that has 75 percent of the wrapped cigar market, that narrowly defined, but I still find that customers walk to a cigar counter and with reason-

able frequency take a look at wrapped and unwrapped cigars, ask their price, find the unwrapped cigar cheaper, and say, 'I will take the unwrapped cigar'—to that extent I would surely argue that the wrapped cigar statistics overstated the dominant firm's position.

"The Court: That is very interesting, because it is quite clear, isn't it, from common experience that what you have described as possibly happening with respect to customers of cigars does happen. There is a very large number of cigar smokers who look when they go into a tobacconist's at both the unwrapped and the wrapped cigars, and you do know, as a matter of fact, the Supreme Court and other tribunals have held that the wrapped cigar market is a market." (R. 662)[37]

The District Court substituted "narrow" Clayton Act market definitions for mergers as enunciated in "recent decisions of the Supreme Court." (R. 85, 446) In looking to the elastic concepts of lines of commerce developed under Section 7 (where product markets may be appropriately defined both more narrowly and more broadly than for purposes of Section 2),[38] the court below not only disregarded the controlling criteria of *Cellophane* but wholly failed to heed the differences (and the compelling reasons for those differences) between Sherman and Clayton Act market definition mandated by the decisions of this Court. Until this case the lower courts, almost without exception, have recognized the distinction in market tests under the two statutes. In *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 593-94, n. 36 (S. D. N. Y. 1958), the rationale for that distinction was stated by Judge Weinfeld:

37. See also, *e.g.*, R. 382-83, 417, 428-29, 446, 591-92.

38. A merger may affect more than one "line of commerce" and have different effects in each. Moreover, the recognized intention of Congress to apply Section 7 to horizontal, vertical and conglomerate acquisitions further underlines the multiplicity of market definitions permissible under that statute. See H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949)

> "* * * *It should be noted that the basic issue in the Cellophane case was that of monopoly power* and the Supreme Court expressly limited the market definition there to the monopolization clause of §2 of the Sherman Act. There is a basic distinction between §2 of the Sherman Act and §7 of the Clayton Act. Further, monopoly power was defined by the Supreme Court in the Cellophane case as 'the power to control prices or exclude competition.' *Obviously, when the question is power over price, substitute products may be relevant because they can limit that power.* The issue under §7 of the Clayton Act is not whether a merger may result in a company having power over price or the power to exclude competition. The issue under §7 is whether there is a reasonable probability of substantial lessening of competition with respect to a product whether or not there are reasonably interchangeable substitutes.'"[39]

This Court's decision in the *duPont-General Motors* case[40] supports this distinction between the Section 7 and Section 2 market tests:

> "The record shows that automotive finishes and fabrics have sufficient peculiar characteristics and uses

39. See, also *Crown Zellerbach Corp.* v. *FTC*, 296 F. 2d 800, 814-15 (9th Cir. 1961), *cert. denied*, 370 U. S. 937 (1962). A former Assistant Attorney General in charge of the Antitrust Division has endorsed the same proposition. Loevinger, "Significant New Antitrust Developments: The Doctrine of Judicial Ratification," 21 A. B. A. Antitrust Sections 237, 242. The official currently charged with the responsibilities of the Antitrust Division has similarly stated, "I think it is clear from the Court's opinion in *Cellophane* and from the presumed fact that the Clayton Act requires less of a showing of probable harm than does the Sherman Act that definition of the market in 'monopolizing' cases is not appropriate for most merger cases. * * * It would seem that no single definition of market would be appropriate for all [merger] cases, or even for a single case in some instances." Turner, "Antitrust Policy and the Cellophane Case," 70 Harv. L. Rev. 281, 315 (1956)

40. *United States* v. *E. I. duPont deNemours & Co.*, 353 U. S. 586 (1957).

> to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' *within the meaning of the Clayton Act.*"

The majority then noted that Section 7's "phrase ['in any line of commerce'] is comprehensive and means that if the forbidden effect or tendency is produced in one out of *all* the various lines of commerce, the words "in *any* line of commerce' literally are satisfied."[41]

This distinguishing rationale was confirmed in *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 325 (1962), holding that criteria other than reasonable interchangeability or cross-elasticity of demand may be pertinent to market definition for purposes of Section 7:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. duPont de-Nemours & Co.,* 353 U. S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because §7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition."

While outlawing monopolization of "any part of trade or commerce," Section 2 does not necessarily deal with

41. (353 U. S. at 593-94) (Court's emphasis in second quotation.)

a single product or service. Thus in *Cellophane* it was said that "when a *product* is controlled by one interest, *without substitutes available in the market*, there is monopoly power." (351 U. S. at 394). Emphasizing that when monopoly power is the issue and substitutes are available it is the pattern of consumer use which is dispositive—rather than the particular product or service allegedly monopolized—this Court declared, "In determining the market under the Sherman Act, it is the use or uses to which the commodity is put that control."[42] (351 U. S. at 395-96)

The conclusion reached in *Cellophane*, which must control this Section 2 case, was summed up as follows:

> "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. *The tests are constant.* That market is composed of *products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.*" (351 U. S. at 404)

The teaching of *Brown Shoe* and *Cellophane* is clear: while "*reasonable* interchangeability of use or cross-elasticity of demand" constitutes "the outer boundaries of a product market" and *may* be inapposite for Section 7 "line of commerce" purposes,[43] it is the *only* test proper

42. Elsewhere the Court stated, "The trial court consequently had to determine whether competition from the other wrappings prevented duPont from possessing monopoly power [in cellophane]. * * *" (351 U. S. at 392)

43. A degree of interchangeability more than merely "reasonable" can be dispositive even for Section 7 purposes, resulting in consideration of only products which are essentially "self-same": "This does not, however, mean that interchangeability can be ignored—a high degree of interchangeability may under certain circumstances make it more or less the same product." *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 593, n. 36 (S. D. N. Y. 1958). And as this Court recently pointed out, even the "reasonable interchangeability of use or the cross-elasticity of demand" test mandated by *Cellophane* in Section 2 monopolization cases may, in appropriate circumstances, be one, but not necessarily the only, valid market calculus for Section 7's "line of commerce" requisite. *United States v. Continental Can Co.*, 378 U. S. 441, 452-53 (1964).

for determining the market under Section 2 when the power to control prices or exclude competitors is the issue. While the Government never disavowed *Cellophane's* market test (the Government urged that competition between accredited central station services and other forms of protection does not exist as a matter of fact), the District Court did reject *Cellophane*. In doing so it lost sight of the controlling question—are there effectively competing substitutes for the alarm company defendants' central station services which prevent their having the power to control prices or exclude competitors?

Proceeding from *Cellophane's* fundamental rule "that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal,"[44] it is manifest that here the District Court twice committed reversible error by applying its own erroneous legal tests and, so influenced, by making clearly erroneous findings of fact on issues pertinent to the only acceptable standard for determining the existence of monopoly power (*i.e.*, the standard of *Cellophane*). First, the court below defined the product or service market too broadly by accepting the Government's "lumping together" of wholly disparate central station services which, having no relation to each other in common or affiliated end use by consumers,[45] are not in any way substitutes for each other and wholly lack reasonable interchangeability or cross-elasticity of demand.

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44. 351 U. S. at 395.

45. *Cf. United States* v. *Chas. Pfizer & Co., Inc.*, 246 F. Supp. 464 (E. D. N. Y. 1965). There the court concluded that, contrary to the Government's contentions, citric acid, based upon "its use as an acidulant in foods and beverages and in effervescent alkalizing powders and tablets," was not part of only a single market. The court found that "* * * the market chosen by the Government consists of at least two markets, *i.e.*, food and beverages as one, and effervescent alkalizing preparations as another. The line between food and beverages on the one hand, and effervescent alkalizing preparations on the other, is marked by the distinctive use of the acid made by each [to add tang to the taste of the former but to release carbon dioxide in the latter], and the difference in classification by type of industry." (246 F. Supp. at 466-67).

Second, having thus erroneously treated all accredited central station services as a unitary "part of trade or commerce", the court below defined that "market" too narrowly by adopting the Government's unrealistic or arbitrary exclusion of the impact of effectively competing services and systems, such as the other electric protection systems employing the same types of equipment, operating concepts, and commercial relationships with subscribers.

2. *The erroneous joinder of diverse and unrelated end use central station services in a single product or service market.*

a. Major categories of central station services, differing in function, equipment, use, customers, price and insurance treatment, were unrealistically lumped together in one integrated "whole".

In inferring monopoly power solely from the alarm company defendants' combined percentages of the business of central stations "accredited for such service by insurance inspecting and rating organizations" (FF 43, R. 755), Judge Wyzanski relied upon the Government's presentation of stipulated figures as to the total revenue and subscribers of all accredited central station concerns. These figures, obtained from alarm company witnesses whose depositions were taken by the parties,[46] were in turn based upon what the Government listed as four groups of services but which, in reality, comprise at least nine different major categories of services rendered by ADT and others.

Thus, the Government's grouping of "night watch and fire alarm" actually comprises two major categories of services, watchman's reporting service and manual fire alarm service. The Government's "burglar alarm" grouping in fact includes three major categories of services, burglar alarm for protection of premises, burglar alarm for safes and vaults (both mercantile and bank) and hold-up alarms. The Government, under the heading of "automatic fire alarm," counted only automatic fire detection

46. GX 312, R. 2266-78, 330-31; R. 254, 256; GTB, p. 26.

and alarm service. Finally, in its last grouping, the Government combined three major categories of central station service—sprinkler supervisory, waterflow alarm, and industrial process supervisory services.[47]

The services within these broad categories selected by the Government are each wholly or significantly unrelated to the others in end use, equipment, price, functions performed, types of subscribers, and insurance discounts available, if any. Meaningful market delimitation for the purpose of ascertaining whether defendants, in rendering such services, have the power to control price or exclude competition patently requires recognition of these facts. We submit that such recognition, ignored by the Government and District Court, compels the conclusion that there is no basis, legal or economic, for joining them in a single product or service market definition.[48] As announced by this Court in *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 325 (1962), "The *outer boundaries* of a product market are determined by the reasonable interchangeability or the cross-elasticity of demand between the product itself and substitutes for it." Here services which are in no sense substitutes for each other and which have no interchangeability or cross-elasticity of demand have been erroneously joined together to produce an arbitrary single market which has no counterpart in the real world.

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47. *E.g.*, GX 330, R. 2711-13; GX 334, R. 2843; GX 357, pp. 9-10, R. 331-35.

48. Even where there has been some stronger basis for asserting a "same end use" relationship between different products, they have been excluded from the same market. For example, sucker or rod oil pumps were held to be part of a separate market from that for hydraulic pumps because they were used only at different well depths. *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. 2d 416, 422-23 (10th Cir. 1952), *cert. denied,* 344 U. S. 837.

(1) Burglar Alarm Services (Premises and Safe and Vault) and Holdup Service

The burglar alarm services arbitrarily selected by the Government are wholly different in the equipment employed and in the ambit of their protection and use. One offers protection for almost any kind of enclosed premises while the others protect solely against attack upon specific objects—safes and vaults either of the bank or mercantile variety.[49] The former, therefore, has utility for substantially any business establishment or residence while the latter are of use only to banks, financial institutions and other enterprises which hold cash, securities or removable

49. Burglar alarm service for protection of premises involves the use of a variety of devices and equipment placed upon subscribers' premises to signal unauthorized entry after the premises have been closed and are unoccupied. Generally no alarm is sounded at the premises but instead upon receipt of an automatic signal central station employees take steps to render appropriate response by notifying police or dispatching guards, depending upon the kind of service contract in effect (some central station systems installed, however, will include a bell at the subscriber's premises as well as the connection to the central station, and such a "combination" system will be used particularly when the subscriber's location involves a longer running time for guard response than required by the underwriters' organizations for the granting of insurance premium discounts). The most frequently used equipment consists of metal foil and switch combinations for doors, windows and other openings. These may be supplemented by floor traps or photo-electric beams. Other more sophisticated devices, such as ultrasonic systems which saturate a room with a pattern of high-frequency sound waves, can be used only in certain types of properties where existing conditions limit the possibility of false alarms. Burglar alarm services for safes and vaults are of several different types. One involves the use of sensitive microphones mounted on the ceiling of a vault to detect attacks and signal alarms to the central station. Special burglar alarm cabinets enclosing safes signal alarms upon any opening of the cabinet or an attempt to force the door or to cut through the walls. A third system involves the laying of an electromagnetic field around a safe. When a burglar penetrates this field, his body capacitance upsets the balance of the system even before he touches the safe, causing a silent signal to be transmitted to the central station. (*E.g.*, GX 3, R. 843-76; GX 4, R. 959-78; GX 284, R. 2164-70, 327; GX 318, R. 2416-17; GX 326, R. 2551-52; GX 337, R. 2884, 331-35; W7a, R. 4769-70; W12a, R. 4907-08; W27a, p. 36; W30a, R. 5392, 497, 595-96)

objects of substantial value. The prices for these two services and the premium discount structures published by the insurance rating agencies have no relation to each other (indeed, the discounts are available only in connection with different kinds of insurance).[50]

Holdup alarm service, inexplicably included in this same grouping by the Government, takes a variety of forms and employs many different types of devices, again not used by any other kind of central station service. Unlike the burglar services aimed at intruders who strike only when premises are unoccupied, and differing also in that it is only a semi-automatic system requiring intentional triggering, holdup service permits persons at the protected premises to activate a silent alarm to the central station while obeying the commands of any armed or threatening intruder. (*E.g.*, W45a, p. 67, R. 497, 595-96) Government witnesses from accredited central stations carefully distinguished between burglar and holdup alarm service, pointing out that the latter was protection against a different hazard.[51] No insurance discounts are available for this service except in connection with bank insurance (but few banks seek the requisite certification) and the prices for it are in no way related to those for the others grouped with it.[52]

The totally different end uses of these three services are further illustrated by the fact that those enterprises which subscribe to premises burglar CSPS seldom use the safe and vault services. On the other hand, banks—a major segment of those using safe and vault protection—seldom use the premises central station service but do make use of the holdup protection service afforded by central stations or other protection services and systems.[53]

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50. GX 5, R. 1014, 1016-21, 327; E-1, R. 3246-48; E-2, R. 3249-50, 398-99; D 75(e), R. 4509-21, 496.

51. *E.g.*, GX 361, R. 3192-93; GX 362, R. 3199, 331-33

52. GX 4, R. 962, 990-92; GX 5, R. 1015, 327; W24a, R. 5224-26, 497, 595-96; E-1, R. 3246-48; E-2, R. 3249-50, 398-99; D 75(e), R. 4509-21, 496; GX 355, p. 21, R. 331-33.

53. GX 346, R. 2989-90, 331-32; W12a, R. 4898; W24a, R. 5216-17, 5222-25, 497, 595-96.

(2) Waterflow, Sprinkler Supervisory, Automatic Fire Detection and Manual Fire Alarm Services

Four of the services selected by the Government without any explanation for including them in the same relevant market concededly have at least some relationship to protection against fire, an end use obviously totally different from and in no sense interchangeable with protection against any of the burglary or holdup risks. The four central station services related to fire protection—waterflow alarm (also known as "WF" or valve alarm),[54] sprinkler supervisory ("SS"),[55] automatic fire detection

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54. Waterflow alarm service is used by commercial and industrial establishments which maintain automatic sprinkler systems to detect and extinguish fires. When augmented by waterflow alarm service, the functioning of the sprinkler system results in a fire alarm. Waterflow alarm serves, too, as a monitoring agent to detect sprinkler system malfunctions and to minimize resulting water damage. Thus, whenever water flows in the sprinkler system—because of a fire-activated open sprinkler head, a ruptured pipe or other disabling leak—special detection devices initiate an alarm which is transmitted through the central station to the municipal fire department. Permitting prompt assistance in extinguishing fires and shutting off the flow of water as soon as feasible, waterflow alarm service helps to minimize damage from fire, water or both. (GX 1, R. 808-10; GX 6, R. 1033-34, 1091-93, 327; GX 326, R. 2552; GX 320, R. 2477; GX 349, p. 10; GX 355, p. 16, R. 331-32).

55. Sprinkler supervisory service is designed to detect circumstances which would prevent the proper operation of automatic sprinkler systems. Detection devices (again of design and character unlike those used for any other central station service) are installed at points which control the supply and distribution of water in the sprinkler system. These devices trigger an instant warning to the central station when closed shut-off valves cut off the supply of water, when the water level in gravity tanks drops to improper levels, when dangerously low temperatures threaten water freezing, when air pressures are inadequate to insure the proper flow of water from pressure tanks, when variations in steam pressure for engine-driven fire pumps threaten unsatisfactory operation, and when power failures occur in connection with electrically driven fire pumps. (GX 1, R. 808-10; GX 6, R. 1033-34, 1091-93, 327; GX 326, R. 2552-53; GX 320, R. 2477; GX 349, p. 10; GX 355, p. 16, R. 331-32).

and alarm[56], and manual fire alarm[57]—are typically used in different circumstances, employ wholly different equipment, and are predicated upon entirely different principles which have in common only the receipt of signals at a central station.

Waterflow service can be used only by establishments which maintain sprinkler systems (or, in a few instances, other types of fire extinguishing systems), and sprinkler supervisory service can be employed only in connection with a conventional sprinkler system. Waterflow service affords fire protection supplemental to that of the sprinkler system, augmenting the likelihood of notification to the fire department, and also protects against water damage from operation or breach of the sprinkler system. Sprinkler supervisory service protects indirectly against fire in that

56. Automatic fire detection and alarm services are available for premises not equipped with automatic sprinkler systems. Also utilizing entirely different equipment than any other central station service, they are of three basic types. One, which employs small-diameter air-filled copper tubing attached to the ceiling of protected areas, operates on the physical principle that rapidly rising temperature will expand the air within the tubing, thereby creating pressure upon signal-activating flexible metal diaphragms in air chambers attached to the tubing (these are known as "rate of rise" systems). A second type of service operates on another principle of physics—that of converting the radiant heat of fire into electrical energy which in turn actuates the alarm (these are known as "radiant heat detector" systems). A third type of service, operating on thermostatic principles, employs fixed temperature devices or thermostats installed on the protected premises which send a signal to the central station when fire raises the interior temperature to a specified point (these are known as "fixed temperature" systems). (GX 1, R. 807-08; GX 6, R. 1089-90, 1093, 327; GX 326, R. 2552-53; GX 355, pp. 17-18, R. 331-33)

57. Manual fire alarm service is another form of fire protection service often used by subscribers whose premises are not equipped with automatic sprinkler systems. Fire alarm boxes installed at the subscribers' premises enable occupants simply to pull a lever, which actuates the alarm to the central station for transmission to the fire department. This type of central station service may be supplemented by a local fire alarm and evacuation system to sound an alarm within the premises by means of bells or horns actuated by the same alarm boxes used to signal the central station. Other occupants of the premises are thus immediately warned of the fire danger. (GX 1, R. 806; GX 6, R. 1090-91, 1093, 327)

it is a maintenance tool intended to assure subscribers that their sprinkler systems will be operable at all times. Subscribers to waterflow alarm service may not subscribe to sprinkler supervisory service but, on the other hand, those who subscribe to sprinkler supervisory invariably use waterflow service as well,[58] thereby demonstrating the disparate end use character of the two services. And again, the prices for these services and the insurance discounts they afford are totally different than for any of the other central station services.[59]

Automatic fire detection service and manual fire alarm service are the two central station services selected by the Government which are truly fire protection services, directly and solely. But again, both as between themselves and as between each of them and waterflow or sprinkler supervisory service, they tend to be used by subscribers situated differently. To illustrate, while *some* subscribers might use all four of these services, those establishments equipped throughout their premises with complete sprinkler systems and using waterflow and sprinkler supervisory service are less likely to subscribe to the other two services. Because manual fire alarm service has minimal utility unless the subscriber's premises are occupied and under surveillance at all times (*e.g.*, many concerns subscribing to this central station service also employ watchman forces), concerns not so situated are more likely to use one or more of the other services. For automatic fire and manual fire alarm services, too, wholly different price structures and insurance discount percentages prevail both between those two different services and the other central station services.[60]

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58. GX 232, R. 2064, 327; GX 348, p. 43, R. 331-32

59. E-1, R. 3246-48; E-2, R. 3249-50, 398-99.

60. E-1, R. 3246-48; E-2, R. 3249-50, 398-99; W11a, R. 4865, 497, 595-96.

(3) Watchman's Reporting Service

Another of the central station services selected by the Government, watchman's reporting service, used only by subscribers who maintain watchman forces, assists in protecting property by supervising watchmen during their tours of duty. The watchman's performance of his rounds is checked by requiring him to signal the central station with key devices located on the subscriber's premises and unlike the devices used for any of the wholly automatic central station services. If, because of illness, injury or other disability, a watchman fails to signal on a prearranged schedule, the central station notifies the subscriber or provides assistance. This service may also provide for emergency signals by the watchman. Not aimed at any specific, single risk like fire or burglary (in fact, subscribers to this service often use a fire service, like manual fire alarm, as well), this service instead insures that watchmen are protecting against any such risks or otherwise performing their assigned duties. As with the other services, prices and insurance discounts for watchman's reporting service are unique to that service.[61]

(4) Industrial Process Supervisory Services

The Government also included in its relevant market a broad variety of central station services generically known as industrial process supervisory services.[62] These services monitor a broad variety of automatic manufacturing processes and diverse environments, giving instant warning of abnormal conditions involving machinery stoppage, temperature deviations, loss of air pressure or vacuum, liquid or materials levels, sump levels, electric cur-

61. GX 1, R. 806-07, 327; E-1, R. 3246-48; E-2, R. 3249-50, 398-99; GX 5, R. 1012, 1016, 1020, 327; GX 320, R. 2477; GX 348, pp. 36-37, R. 331-32.

62. The Government concedes the significant contribution made to its market figures by these services, noting that together they constitute "an increasingly important form of protection service." (GTB, p. 206)

rent flow, valve closings, power failures, humidity variations and the operation of toxic--and flammable—gas equipment, as well as other applications. This partial catalog of end uses for these services more than suffices to establish the complete lack of interchangeability between them and the other central station services (and indeed between themselves). They have wholly different price levels in comparison with other central station services. No insurance discounts can be obtained with these services and they are not in any way approved by the underwriters.[63]

b. Services forced into the alleged market have no interchangeability or cross-elasticity of demand.

The only factors common to all of these central station services are that each involves (1) the use at subscribers' premises of devices designed to detect or react to these diverse hazards, environmental conditions, or industrial operations and (2) the transmission of signals to the central station. But the devices used for each central station service (while they may be used in electric protection systems and services other than central station but directed to the same end use or hazard) are wholly different from those used for any other central station service. These different kinds of devices are connected to separate transmitters and circuits or wires (*e.g.*, a fire or burglary wire leased from the local telephone company)[64] running to the central station. The signal-receiving equipment maintained at the central station, where the signals transmitted from the subscribers' premises are recorded, differs from one service to the next (*e.g.*, there are separate burglar and fire alarm consoles, boards or panels). Depending upon the type of service, the central station reacts in different ways, relaying alarms to the local fire or police departments, dispatching employees to the subscribers' premises, notifying the subscriber, other-

63. *E.g.*, GX 320, R. 2477; GX 355, pp. 20-21, R. 331-33; W6a, R. 4728, 497, 595-96.

64. GX 355, p. 22, R. 331-33.

wise responding to the signal received, or merely recording it.

From this summary, it is manifest that wholly different end uses, devices, equipment, prices, insurance treatment and all other salient considerations are covered by the broad variety of central station services thrown together in a meaningless hodgepodge by the Government and called the "relevant market." Limiting discussion to the simplest analysis of these diverse factors, it is clear that no subscriber will substitute a burglar protection service for a fire or waterflow protection service. They are simply not interchangeable, either functionally or reactively. And the demand and prices obtainable for one of the central station services selected by the Government have no competitive impact upon the demand or prices for the other, so that there is a total absence of cross-elasticity of demand. In sum, these diverse services arbitrarily melded into a single "whole" by the Government and District Court are in reality functionally, operationally, commercially, economically and competitively separate and distinct.

c. Neither evidence nor argument suggests any competition among the diverse central station services joined in a single market.

Significantly, here no witness, document or other evidence suggested that the selected central station services, affording protection against such different hazards as fire and burglary, are in any way competitive or part of the same market. To the contrary, all the evidence establishes that the suppliers of the various protection services and systems regard only those protecting against the same hazards as competitive.[65] Indeed, the very details of their

65. Alarm company witnesses, including those called by the Government and offering accredited central station services, regularly drew this distinction in risks covered regardless of the type of protection (*e.g.*, "the general fire classification and the general burglary classification" and "Of course, it is all burglar alarms, whether central station or local alarms, * * *"). The same view was shared by representatives of the underwriters' agencies, each of which deals

commercial routine confirm that fact (*e.g.*, even the Government's accredited central station witnesses offering the other forms of electric protection often use exactly the same contract forms for all those services directed to the same end use (burglary, fire, etc.) and many of them do not even keep their financial and revenue records separate for the different services directed to the same end use ("* * * for anyone looking at them you couldn't tell whether they were central station or local")).[66]

While the Government may urge that there is a single, ultimate end use here involved, *i.e.*, protection of property, this is in no way analogous to the closely related end uses found for cellophane[67] and other flexible packaging materials—the wrapping of consumer products. As *Cellophane* holds, to be included in the same " 'market' which one must study to determine when a [defendant] has monopoly power," products or services must be "reasonably interchangeable" and the cardinal aspects of that concept embody both functional and reactive interchangeability or

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with only fire or only burglar risks and forms of protection (*e.g.*, the Burglary & Glass Division Manager of the National Bureau of Casualty Underwriters repeatedly referred to the "burglar alarm industry" and testified, "When I speak of the alarm industry, I am thinking of the companies that provide premises, safe, vault protection, and in my thinking I include the central station and the local; * * *") (GX 346, pp. 15, 21, 53; GX 320, R. 2474-75; GX 328, pp. 44-45; GX 329, R. 2675; GX 330, R. 2730-31; GX 331, R. 2736-37; GX 333, R. 2788-89; GX 336, R. 2855-56; GX 337, p. 102; GX 362, R. 3208, 331-35; W14a, R. 4953, 497, 595-96.)

66. *E.g.*, GX 318, R. 2399-400; GX 319, R. 2422-23; GX 326, R. 2581-82; GX 329, R. 2669-70, 2675; GX 330, R. 2730-31; GX 333, R. 2796, 2798; W2a, R. 4640-41; W5a, R. 4665-66; W6a, R. 4714-15, 4734-35, 497, 595-96.

67. And for each of the related end uses considered there (wrapping bread, wrapping candy, wrapping meat and so on) the *single* product allegedly monopolized was employed, along with one or more other flexible wrapping materials. Here, however, the market allegedly monopolized is said to include a variety of services so different in physical characteristics (devices and equipment), price (both charges to subscribers and insurance discounts, if any), and end uses (protection against fire, burglary, and so on) as to be totally non-interchangeable.

cross-elasticity of demand.[68] The ability and willingness of customers to use substitute products or services comprise the focal point of analysis. Here there is not even functional, let alone reactive, interchangeability among the different central station services aimed at such diverse end uses as fire and burglary protection but arbitrarily lumped together by the Government and court below.

Here the most that can be said is that we have a series of wholly different protective purposes or end uses served by arbitrarily selected services which have in common only their use of a central station to receive signals. If this were a sufficient basis to include them in a single product or service market definition, then it would be equally proper for Section 2 purposes to find a unitary "market for diesel conveyances" populated on the supplier side by those who sell passenger busses, tractor-trailer combinations, trucks, earth-moving equipment, passenger and freight locomotives, power boats, and others, all of which employ diesel engines of one or more types but which clearly lack reasonable interchangeability or cross-elasticity of demand. Such all-encompassing criteria are wholly inconsistent with the teaching of *Cellophane,* where this Court said:

> "Illegal power must be appraised in terms of the competitive market for the product. Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, *how far buyers will go to substitute one commodity for another.* * * * In determining the market under the Sherman Act, it is the use or uses to which the commodity is put that control. * * * In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." (351 U. S. at 393, 395-96)

68. *United States* v. *E. I. duPont deNemours,* 351 U. S. 377, 404 (1956).

Neither the Government nor the District Court offered any reason or analysis for forcing all of the differing CSPS services into a single market mold. Apparently the only consideration given weight was the fact of available insurance accreditation[69] (inconsistently, as previously noted, the Government and court below have included in their market definition and revenues central station services which are not approved and for which the underwriters offer no insurance premium discounts). And yet the very same rating agencies granting insurance approval for some of the included central station services recognize each of these services as separate and distinct. For each service, they have established totally different standards and premium discount structures which are unaffected by an insured's subscribing to only one or to several of these accredited central station services. Indeed, the agencies themselves are different, those dealing with fire services being separate and independent of those dealing with burglar services.

Moreover, these services are not sold on the basis of any tying or "package" requirement and the fact that a subscriber avails himself of more than one service does not reduce the price charged for any of the services (*e.g.*, even if both a burglary and a fire service are furnished to the same subscriber, he pays the same rate that would be charged for each alone). Rather each subscriber decides the particular service or services desired, without any price incentive to take more than one. In those cities able to sustain two or more central stations, subscribers who desire several different services often employ more than one accredited CSPS concern (such subscribers also frequently avail themselves of an accredited CSPS service for one risk or end use and a non-CSPS service for another, *e.g.*, automatic fire detection CSPS and local burglar alarm electric

69. If insurance accreditation were the determinative consideration, the relevant market would logically and realistically include a variety of non-central station protection services, since insurance accreditation and premium discounts are not limited to accredited CSPS. See pp. 76-87, *infra*.

protective service). For example, a competing accredited central station witness whose testimony was introduced by the Government highlighted the extent of this commercial fact in declaring, "I know we had quite a few accounts where other companies, such as ADT, put in the fire alarm and we put in the burglar alarm. We have accounts of this type." (GX 337, p. 88, R. 331-35)[70]

The District Court, in adopting the Government's contentions, erred not only in including all of these different, non-interchangeable accredited central station services in a single market; it also erred in excluding from that "market" various other forms of protection directed to the same end uses as the services furnished by accredited central stations.

3. *Effectively competing, interchangeable protection services and systems for which there is marked cross-elasticity of demand negate the requisite power to exclude competition or control prices in the central station services.*

a. Defendants' basic contentions

Before considering the evidence, let us spell out the ultimate contentions of the defendants in connection with this point. Contrary to the gratuitous findings of the court below (FF 28-29, R. 753), the defendants have never contended that the relevant market includes "all protective systems, ranging from individual watchmen on the premises to the elaborate accredited central station alarm systems typified by the alarm company defendants' activities." Defendants' contention is merely that the Government failed to carry its burden of proof, because the evidence demonstrating the facts of the market place establishes that insurance-accredited central station services (here assuming *arguendo* that all of these different end use services could be combined in a single market) are for Sherman Act pur-

70. See also GX 339, pp. 45-46, R. 2913-14; GX 345, p. 13; GX 362, R. 3221, 331-35; W17a, R. 5076; W34a, R. 5450-51; W46a, pp. 73-74; R. 497, 595-96; R. 362-63, 369, 420-21, 421-22, 424-26.

poses, only a part of some larger relevant market in which effective competition with other protective systems and services is the reality. Further, the record shows that the impact of such competition is so material and significant that those other forms of protection cannot be totally disregarded, as they were below, in determining whether defendants have the requisite power to control prices or exclude competition.

Stated differently, it is the contention of defendants that the District Court erred as a matter of both fact and law in failing to consider the intense competition of other protection services and systems in deciding whether defendants possessed monopoly power (power to control prices or exclude competitors) as to the trade in accredited central station services.[71] Defendants urge that the impact of competition from protection services and systems other than accredited CSPS, *in addition to the competitive impact of other accredited central station concerns* in those cities where they compete with defendants, prevents defendants from possessing monopoly power in the accredited central station business.[72] Paraphrasing *Cellophane,* this is de-

71. We do not urge that in order to show monopolization of the trade in accredited CSPS, the Government had the burden of proving monopoly power over the trade in *all* protection services and systems. Rather we argue that the court below should have considered inter-product or inter-service competition when determining whether defendants have monopoly power over the business of central stations "accredited for such service by insurance inspecting and rating organizations."

72. In *Cellophane,* this Court found that only the competitive impact *of materials other than cellophane* precluded duPont's having monopoly power over Cellophane: "It seems apparent that duPont's power to set the price of cellophane has been limited only by the competition afforded by other flexible packaging materials. Moreover, it may be practically impossible for anyone to commence manufacturing cellophane without full access to duPont's technique. However, duPont has no power to prevent competition from other wrapping materials." (351 U. S. at 391-92). As shown hereafter, the defendants in this case have competition from other accredited central station concerns and must respond to their prices as well as those of other protection services and systems so that defendants' alleged power over price, unlike that of duPont, is not limited solely by "sub-

fendants' position: "The charge was monopolization of the business in accredited central station services. The defense, that accredited CSPS is merely a part of a broader relevant market including other protection services and systems, whether in whole or in part." (*Cf.*, 351 U. S. at 394)

Contrary to the approach of the District Court, the ultimate question to be resolved is not what percentage of a market delimited by particular products or services is occupied, but rather whether a defendant has monopoly power as to a particular product or service. The real issue is whether a defendant's product or service, considering the end uses to which it is put, is so distinctive in the minds of customers and in terms of their buying conduct as to make it free from any meaningful competition from different products or services.[73]

With this ultimate issue in mind, it is manifestly unnecessary to arrive at an exact and exhaustive formulation of what products or services are in and what products or services are out of the "market". Thus, until the unprecedented decision below, in the context of monopolization charges market definition has always been recognized as merely a tool and not an end in itself. If it can be shown that products or services with reasonable interchangeability or cross-elasticity of demand have been excluded from the allegedly relevant market, then the Government has failed to carry its burden of proving monopoly power and it becomes irrelevant whether the "market" has been precisely defined to include in full statistical detail each and

stitute" or differentiated products or services. And the evidence of the accelerating, many-fold increase in the number of accredited CSPS concerns newly entering even that protection business alone shows that defendants, unlike the effects of duPont's exclusive cellophane techniques, interpose no barrier even to such "selfsame" product or service competition. (See pp. 141-44, *infra*).

73. "Market delimitation is necessary * * * to determine whether an alleged monopolist violates §2. The ultimate consideration in such a determination is whether the defendants control the price and competition in the market for such part of trade or commerce as they are charged with monopolizing." *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377, 380 (1956).

every effectively competing product or service (or portion of the business therein) for each and every different end use.

To illustrate, if reasonable interchangeability or cross-elasticity of demand could be shown between waxed paper and glassine on the one hand and cellophane on the other, then these substitute products are sufficiently competitive to prevent duPont from possessing monopoly power over the price of cellophane, and it is immaterial whether another product, such as pliofilm, should also be considered to be in the market for purposes of testing market power over the trade in cellophane. Similarly, it would be unnecessary to prove that the total business in each of these substitute products is competitive with cellophane or that each substitute product competes with cellophane in every one of its end uses and as to each of its customers.

Based upon this analysis, defendants do not and need not contend that the outermost limits of the market have been defined here or that every dollar of business comprising the market has been counted. Rather they urge only that the evidence negates the existence of monopoly power by the defendants or any of them, because other services and systems exert sufficient competitive impact to preclude any inference of such power solely from defendants' asserted percentages of an alleged accredited central station market. As this Court concluded in *Cellophane*, the problem "is to determine whether duPont has monopoly power over cellophane: that is power over its price in relation to or competition with other commodities." (351 U. S. at 393-4)

This same analysis also demonstrates that there can be no single criterion, such as price, quality or physical character of the product, which can be isolated and made the basis for "relevant market" inclusion or exclusion of products or services. Obviously there are some products so unique that for each of their end uses buyers will take only totally fungible products as substitute sources of supply.[74] And in such situations there is meaningful compe-

74. *Cf., United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S. D. N. Y. 1916), *appeal dismissed*, 249 U. S. 621.

tition only between such identical products and they must sell at a substantial identity in price to be competitive. But it is equally obvious that often products compete with different or non-fungible products for all or some of the same end uses upon the basis of a composite of price, quality and other factors. Such competition is no less real or significant than that between "selfsame" products.

Where there is proof that "buyers' habits" and "mobility of demand"[75] produce competition among products with different characteristics, quality, and prices, such competition must be considered in determining whether the monopoly power requisite to a finding of monopolization exists. Competition is a fact born solely of customer evaluation and response. It can be determined only in the market place, not in any lawyer's catalog of differences between products or services in terms of physical or other characteristics, quality, or prices. "Illegal power must be appraised in terms of the competitive market for the product."[76]

b. Disregarding the only appropriate criteria for market definition in a monopolization case, the District Court applied an erroneous legal theory and made clearly erroneous findings in concluding that the market is limited to accredited central station services.

In view of such basic considerations as these, the monopolization decisions of this Court have commanded searching analysis of the market setting. The findings of the court below, however, clearly indicate that here there has been no careful analysis of the evidence, such as was meticulously undertaken by the trial court in *Cellophane* and endorsed as the proper legal test by this Court. Here the District Court just was not interested in any inquiry as to whether other protection services or systems are con-

75. *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 612 (1953).

76. *United States* v. *E. I. duPont deNemours & Co.,* 351 U. S. 377, 393 (1956).

sidered *by customers* to be reasonably interchangeable with insurance-accredited central station services, considering end use, quality and price. Instead the court's focus was solely upon criteria and facts pertinent to a Section 7 merger market analysis but wholly irrelevant to market definition directed to the question of power over price and competition. Comparing the findings of the court below against the record, even examined in the capsule form necessary here, it is apparent that the wealth of evidence disproving the validity of the Government's market definition for purposes of Section 2 was either ignored or disposed of with a few facile, cryptic and erroneous generalizations.

Judge Wyzanski's unrealistically circumscribed approach to the market issue was manifest in such declarations as, "I am quite sure that in the long run the Supreme Court of the United States is going to take about as narrow a view of the market as the circumstances here permit." (R. 544) His disregard for *Cellophane* and virtual waiver of the Government's burden of proof on the market issue are patent upon comparison of the Government's contentions and the court's conclusions, on the one hand, with the evidence and, indeed, with the court's own findings on the other.

(1) Principal factual contentions of the Government, lacking support in the record, were adopted by the Court below and erroneously made the basis for unrealistic limitation of the market contrary to the test of Cellophane.

The Government mounted the following principal arguments in support of its ultimate contention that no other forms of protection compete with accredited central station services. It urged that central station services and systems have different characteristics than other forms of protection, specifically including other electric protection systems and services. It urged that central station protection services are of superior quality and efficiency and therefore afford larger insurance premium discounts to

subscribers. It argued that central station protection services sell at higher prices. It argued that *some* classes of customers will use only central station protection services while *some* other classes of customers will use only other forms of protection. Finally, it urged that where customers have changed from one form of protection to another typically the shift has been to accredited central station protection services.[77] We now examine these contentions, together with the findings and conclusions of the District Court, against the market realities demonstrated by the evidence.

(a) Different Characteristics

The District Court correctly described the characteristics of the accredited central station business as follows:

> "The central station protective service * * * business consists of maintenance of a central station, installation and maintenance of hazard detecting devices on the subscribers' premises, connection of these devices to the central station by wires leased from the local telephone company, and receipt and handling of alarms transmitted to the central station from the subscribers' premises." (FF 2, R. 747)

In addition, however, there is a broad variety of other electric protection systems and services, including unaccredited central station, proprietary, auxiliary, direct connected (or remote station), telephone answering, and local alarm systems and services. For each of the differing, individual risks, hazards, conditions, or environments served by a particular central station service, one or more of these other services and systems serves the same end use. While in no way denying that they serve the same uses (*i.e.*, are functionally interchangeable), the court below gave only passing and incomplete attention to these other forms of electric protection and their competitive interrelationship with the accredited central station services.

77. GTB, pp. 175-217; GRB, pp. 8, 12.

The other comparable electric protection systems embody basically the same physical equipment and functional concepts. The devices and wiring placed in the protected premises (*i.e.*, the "systems") are so identical for each particular hazard or use as to be interchangeable from one type of service to another in practically all cases.[78] In those instances where subscribers have switched from one electric service to another, the change has been accomplished merely by connection to, or disconnection from, a transmitter and wire running to a central station, telephone answering office, or other alarm receiving site of the devices and equipment already upon the subscribers' premises. Indeed, essentially the only distinguishable factor among the various services and systems from the viewpoint of physical components and operating characteristics lies in the place where the alarm or signal is received.[79]

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78. As an Underwriters Laboratories witness called by the Government testified in connection with the burglary protection certification requirements established by that agency, the protective devices for both local and central station services, if placed upon identical premises, would be the same except for the transmitter, and the extent of the installations or systems would be identical in both cases. (GX 352, p. 52, R. 3077-78, 331-32) And competing accredited central station witnesses for the Government testified that direct connected fire alarm systems, for example, consist "of the devices that are used in the central station service being connected to a panel that is installed in the fire alarm headquarters of the municipality involved. * * *" (GX 355, p. 24, R. 331-33). An alarm company witness furnishing both local alarm and accredited central station service testified, "* * * the wiring for local alarm is exactly the same as the wiring for central station alarm. That is, if you say it has to meet Underwriters' specifications, the wiring is the same." (W12a, R. 4903, 497, 595-96).

79. Government witnesses testified, "The only difference between a local and central station, the local rings a bell, the central station rings in the office. We install them all the same, for one reason, if a man decides later to put a central station in, we change the box and that's all." (GX 324, R. 2515, 331-32; see also, *e.g.*, GX 276, R. 2130-32, 327; GX 318, R. 2394-95; GX 341, R. 2942; GX 339, p. 44; GX 320, R. 2436, 2474-75; W9a, R. 4810-11; W10a, R. 4853-54; W34a, R. 5430-31, 5433-35; W45a, R. 5666; W47a, R. 5728-29, 497, 595-96)

Proprietary system signals are received at a console, panel or station just like that of a central station but located and manned instead on the protected premises.[80] Government witnesses from accredited central stations and others described these proprietary systems as "miniature central stations," a "kind of a central station operation that is * * * tied into the subscriber's premises," and "These are central office alarms, whereas the alarm is connected not to our office but to an office of the subscriber, where he maintains guards."[81]

Direct connected systems transmit signals directly to fire or police stations, where they are received on the same equipment by the personnel there. Government witnesses described direct connected systems as "practically the same type of operations [as central station], only the fire alarm equipment, receiving equipment, is monitored by someone on duty at the fire department, and likewise the burglary alarm would be monitored by the police department." (GX 319, R. 2421, 331-32)[82] Auxiliary systems, on the other hand, are connected with existing municipal sig-

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80. A Government accredited central station witness described proprietary systems as follows: "Proprietary * * * is a complete system within the customer's premises over which his guards or maintenance people or personnel would answer the alarm and one in which they maintain their own service. It is a system we might sell outright or a system we could rent to them. * * * [Y]ou might consider it a miniature central station in which all the devices around the plant—it could be a combination of fire and burglary and could run into a central panel and similar to the type we use in our central station. That equipment carries a specific rating under the rules of the National Fire Protection Association for proprietary systems. * * *" (GX 326, R. 2549-50, 331-32) The Manager of one of the insurance rating agencies, Factory Mutual Rating Bureau, testified that "A proprietary system is similar to a central station system but is owned or leased by the owner of the protected property and entirely under his control" (GX 348, R. 3025, 331-32).

81. *E.g.*, GX 320, R. 2478; GX 330, R. 2721; GX 331, R. 2745-46, 331-35; R. 366-67, 520-21.

82. See also, *e.g.*, GX 319, R. 2419-21; GX 331, R. 2744; GX 326, R. 2597, 331-35.

nal systems, such as the street corner fire alarm box circuits which carry the signals to the receiving panels manned at the fire department. (R. 355-56; GX 2, R. 817, 327)

Local protection systems trigger audible and visible alarms at the protected premises. As accredited central station witnesses called by the Government testified, "A local alarm consists of these various devices that I have described in the central station service being connected to a control cabinet where the system can be turned on and off and from there it is connected with a large gong on the outside of the building." (GX 355, p. 25, R. 331-33)[83]

Both telephone answering and central station (accredited and unaccredited) service enterprises receive alarms or signals on panels or boards at independently maintained points away from the protected premises, and then, if action is called for, relay them to fire or police headquarters or to the subscriber and, in some instances, dispatch their own personnel. The president of a leading accredited central station concern described telephone answering service as using "one of our regular central station receiving boards and put that in the telephone answering service and they operate it for that." (GX 326, R. 2578, 331-32) Another Government accredited central station witness testified that telephone answering and central station "are essentially similar systems."[84] (GX 336, R. 2878, 331-35)

These conceded facts, contrary to the Government's efforts to establish "distinctly different types of service,"[85] demonstrate how insignificant are the differences in physical and operational characteristics between central station and competing electric protection systems serving the same

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83. See also, GX 319, R. 2431-32; GX 320, R. 2474-75; GX 324, R. 2515, 331-32; W8a, R. 4805-06, 497, 595-96.

84. See, also, GX 318, R. 2395, 2411; GX 324, R. 2499-500, 2515, 331-32; W13a, R. 4949-50; W16a, R. 4989-90; W26a, R. 5299-300, 5303-04; W29a, R. 5376; W40a, R. 5561-63; W45a, R. 5666, 497, 595-96.

85. GTB, p. 198.

end uses.[86] They wholly belie the District Court's summary findings, destitute of supporting discussion or analysis, that central station systems are "elaborate", that by comparison other systems are "less integrated, advanced," and that "there is a major product difference far transcending the obvious possible minimal cross-elasticity of demand." (FF 13, 28, R. 749, 753) Not only is the finding of a "major product difference" clearly erroneous but the court below patently flaunted *Cellophane*, applying a wholly erroneous legal theory. Thus, while recognizing the "obvious possible" cross-elasticity of demand (whether minimal or otherwise) between central station and other forms of protection, the District Court simply disregarded any such inquiry on the mistaken ground that "product difference" alone, without meaningful reference to customer reaction, could be assumed wholly to overcome or transcend cross-elasticity of demand, making any factual evaluation of that ultimate issue unnecessary.

To the contrary, *Cellophane* holds, "Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, *how far buyers will go to substitute one commodity for another.*" (351 U. S. at 393) The facts of *Cellophane* demonstrate that markedly greater differentiations in characteristics than those here may nonetheless permit sufficient competition between products to disprove

86. The significance of this identity of physical equipment and operating concepts between accredited central station and the other electric protection systems was heightened by the unchallenged evidence that most accredited CSPS companies, including the defendants, offer the other protection systems as well. Conceding these facts, while ignoring the identity of equipment and function and the ease of entry thus facilitated by substantial interchangeability of systems, the District Court cryptically concluded that "this entry by one company into two or more adjacent markets has no substantial significance in defining either of those markets." (FF 14, R. 749-50) In *United States* v. *United Shoe Machinery Co.*, 110 F. Supp. 295, 303 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954), however, Judge Wyzanski himself took a diametrically opposed view: "To define a market in terms of what the [suppliers offer] does not involve circular reasoning. For the problem of defining a market turns on discovering patterns of trade which are followed in practice."

monopoly power so long as consumer evaluation of them is such as to establish reasonable interchangeability or cross-elasticity of demand. There competing flexible packaging materials differed from cellophane in one or more physical characteristics, such as tear strength, moisture resistance, gas permeability, transparency, and so on. Indeed, none of the wrapping materials competing with cellophane possessed precisely the same characteristics. Recognizing that the differing characteristics of substitute or differentiated products are not a valid basis for disregarding them in determining the existence of monopoly power, this Court expressly rejected the contention that the market relevant for ascertaining power over price or competition is limited to products "substantially fungible" with the allegedly monopolized product:

> "* * * [I]llegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market." (351 U. S. at 380, 394, 398-99).

And on this issue the dissenting members of this Court were not in disagreement with the majority: "If the conduct of buyers indicated that glassine, waxed and sulphite papers and aluminum foil were actually 'the selfsame product' as cellophane, the qualitative differences demonstrated by the comparison of physical properties * * * would not be conclusive."[87] (351 U. S. 416)

87. Apart from relying upon the differing characteristics argued by the Government, the District Court also concluded that the defendants' "subscriber contracts with their installation and annual charges" are illustrative of the fact that accredited central station services constitute an "identifiably separate market." (FF 31, R. 753) Not only do any such supposed differences in the characteristics of central station service fail to disprove reasonable interchangeability or cross-elasticity of demand, but in fact competing non-central station protection system services employ substantially identical contracts, which also embody installation and annual charges. Indeed, these competing services are furnished upon the basis of commercial relationships with customers essentially identical in all respects. While the court below outlined in detail the nature of such relationships

(b) Superior Quality and Efficiency

One of the arguments most emphasized by the Government was that central station services are superior in quality and efficiency to any other protection service, whether involving automatic electric systems or not. Significantly, these arguments were mounted not upon customer testimony or reaction but rather solely in terms of (1) the commercially motivated convictions of central station spokesmen accustomed by competitive necessity to arguing that their services offer advantages in comparison with other forms of protection and (2) the availability of insurance premium discounts for some central station services.

(i) The Attitudes of Alarm Company Personnel

For example, the Government relied heavily upon the ADT sales manual, which instructs its salesmen how to argue the merits of central station service in answering objections raised by potential customers based upon their evaluation of other electric protection systems and services

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only for central station concerns (FF 6, R. 748), witnesses from electric protection concerns, offering such services as local burglar alarm and telephone answering service, testified to the fact that they operate on the same basic commercial format, including installation and annual service charges, retention of title to equipment, and length and provisions of contract, all of which were confirmed by copies of their contract forms (some offering the other forms of electric protection along with central station service even use the same contract forms for both). (GX 326, R. 2581-82; GX 329, R. 2675; GX 330, R. 2730-31, 331-35; W2a, R. 4690; W5a, R. 4665-68; W8a, R. 4789-90, 4796-98; W9a, R. 4815-17, 4820-21, 4827-28; W10a, R. 4827-49, 497, 595-96.) Moreover, while some electric protection systems (*e.g.*, proprietary and auxiliary) may in some instances be sold outright and with or without charges for continuing services during a contractual term, such transactions have impact upon the competing central station services in that they eliminate the need for them, as even the Government's accredited central station witnesses testified. (*E.g.*, GX 331, R. 2754-55, 331-35) Consequently, the question remains whether the response of customers to such systems establishes that they have reasonable interchangeability or cross-elasticity of demand.

(including local alarm and other services, all of which the sales manual expressly refers to as "competitive items or services"). (GX 7, R. 1185-86, 327) Concededly, like businessmen in every field of endeavor, ADT and other companies with investments in the central station business promote their services by arguing their advantages and minimizing their disadvantages. ADT exhorts its sales force to convince potential customers that central station services are "superior in performance and results to services of this character directly connected to municipal fire and police departments or other points of remote control * * *"[88] Apart from the fact that the commercial necessity of urging central station superiority demonstrates that both central station companies and the customers they solicit recognize the existence of competition from other protection systems and services, the sales efforts in behalf of the competing systems and services, as would be expected, are similarly based upon argued superiority or greater efficiency.

To illustrate, while central station and telephone answering service operators point out that direct connected and auxiliary systems usually do not afford supervisory service,[89] those offering such systems capitalize upon the

88. The same 1955 internal ADT document, while urging that ADT sales personnel attempt to convince customers of the superiority of central station services, at the same time notes that ADT's competitive files are filled with details concerning direct connected systems and services which compete with ADT at locations where it has an established central station operation and states that meeting such competition is a joint responsibility of the entire ADT organization. (GX 278, R. 2135-37, 327)

89. Testimony of alarm company witnesses indisputably establishes the fact that there is functional interchangeability between each of the central station services and one or more other types of alarm system or service, a fact not rejected by the District Court. That testimony also establishes that even the supervisory aspects of central station service are available through other electric protection services, including direct connected and auxiliary systems in some instances. The following illustrations are typical of the testimony given by alarm company witnesses. A Cleveland alarm company operator testified that local alarms "could do almost anything that central office could do but the only difference is that instead of linking into the central office, the alarm rings locally at the premises." (W8a,

fact that their alarms go directly to fire or police headquarters without the delay of relaying messages at a central station or telephone answering service,[90] thereby avoiding

R. 4805-06, 497, 595-96) An Oakland operator testified to his offering industrial process supervisory service through the telephone answering service he maintains. (W13a, R. 4948-50, 497, 595-96) A Los Angeles alarm company witness testified that he furnishes sprinkler supervisory service through his telephone answering service and that his company is among 75 to 100 enterprises engaged in such service in the Los Angeles area. (W16a, R. 4989-90, 497, 595-96) A Saint Paul alarm company witness testified that his telephone answering service offers the fixed temperature thermostat type of fire protection in addition to the supervisory aspect of burglar protection involved in keeping records of openings and closings. (W26a, R. 5299-300, 5303-04, 497, 595-96) A California alarm company witness testified that his company employs the thermal rate of rise type of equipment in connection with its local fire alarms and that it provides sprinkler supervisory and waterflow alarm service through its unapproved central station. (W29a, R. 5376-77, 497, 595-96) An unapproved central station witness in Los Angeles testified that the mechanical aspects of that service are the same as approved central station service and that while five or six of his accounts were about to receive insurance certificates, "everybody else gets the same standard central station service as an approved account." (W45a, R. 5666, 497, 595-96) Like others, an accredited central station in San Francisco furnishes sprinkler supervisory service with both its direct connected (or remote station) and proprietary as well as central station systems, as the Government's witness from that company testified. (GX 331, R. 2744-45, 331-35) ADT competition reports note competing concerns furnishing "waterflow supervision hooked up directly to" fire departments. (B38, R. 4397; see also B92, R. 4400; E7, R. 4535, 327; GX 319, R. 2429; GX 348, p. 53, R. 331-32). A Dayton telephone answering service witness testified that his burglar service dispatches guards, checks openings and closings and records the entrance of unauthorized persons on the premises after hours. (GX 318, R. 2395, 2411, 331-32). A Peoria alarm company witness testified that temperature control alarms and sprinkler supervisory systems are connected to the fire and police departments there. (GX 342, pp. 27-28, R. 331-35)

90. The president of one of the large companies offering systems for direct connected or remote station fire protection service testified that such service was superior to central station service. He pointed out that central station personnel must wait for two coded signals to come in from the subscriber's premises, interpret the code, and then retransmit by telephone or another code to the fire department. Unlike the direct connected system which directly identifies the location of a fire at a panel in the fire department, these facts of cen-

additional opportunity for human error (indeed, those offering direct connected and auxiliary systems point out that often municipal authorities strongly favor or even require such direct connections).[91]

In the field of burglary risk, local alarm systems are criticized by central station and other electric protection system concerns on the ground that they do not absolutely assure response. Local alarm proprietors, on the other hand, answer that their systems are designed to alert passers-by, the patrolman on the beat, or the occupants of nearby premises and in fact offer high likelihood of response. They assert that local alarms are superior to central station and other silent alarm systems (direct connected, proprietary and telephone answering) in that they give an immediate alarm, frighten away intruders, and are particularly effective in populous areas (those where the bulk of central station business is centered) and in cases of "hit and run" show window attacks. They point out that with the silent alarm systems no alarm sounds at the premises and by the time response is made by police or a guard several minutes at least have elapsed. Their testimony emphasized particularly the strong deterrent effect of the local alarm.[92]

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tral station operation increase delay and the chance for human error. (W41a, R. 5594-95, 497, 595-96). In the fields of burglar and holdup risk, the suppliers of direct connected systems, such as Diebold, assure potential customers that those systems are superior to central station service for the same reasons. (W24a, R. 5218-19, 5238, 497, 595-96).

91. For example, an ADT report on the termination of its central station services by bank branches in New Jersey noted, "Matters were not helped * * * when the Wayne, New Jersey police were informed of a hold-up by bank employees *before* the Wayne Police Department was notified by ADT of a hold-up alarm signal." As a result, the Police Chief requested direct connected service. (D4, R. 496; see also, *e.g.*, D97, R. 4526-27; A53, R. 4345-49; F20, R. 4597-99; D94; D96; B97; B100; C1, R. 404; C5; C50; H40; I5, R. 496-97; W38a, R. 5518, 497, 595-96.

92. "It has protected the customer adequately because when that gong sounds, that burglar isn't going to stick around very long. It has a psychological effect on the burglar." (W20a, pp. 46-47, R. 497, 595-96) "We believe that a gong is the greatest psychological deterrent to a break-in there is, much superior to the so-called silent

Some witnesses furnishing both central station and other services, including accredited central station witnesses called by the Government, candidly testified to the comparative advantages of other systems, conceding that they afford effective protection: "We do just as well for our local alarms [as] we do for our station [and there is no significant difference in the protective qualities] and the results."[93] (W9a, R. 4835, 497, 595-96) A Washington, D. C. Government witness pointed out that both the approved and unapproved services provided by his central station are of the same quality ("The service from the standpoint of quality is the same."). (GX 320, R. 2481, 331-32) Another witness, whose central station had recently been accredited

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signal. * * * [T]he silent signal, it takes from two to twelve minutes to get a man out to the premises after a signal has been energized. It takes two to four minutes for the average burglary and break-in and they are gone. * * * With a gong, as soon as they trip the gong, they know that people are going to look, whether someone calls the police or not, they still know people are going to look. They don't want to be seen. They don't want their vehicles, if they have them, seen, so they leave the premises with a minimum amount of damage." (W7a, R. 4776-77, 497, 595-96) "If I thought [central station service offered more protection], sir, we would have central station service. We have the type of services that we have because we feel that it is more than adequate to protect the premises." (W23a, R. 5213-14, 497, 595-96) An unaccredited central station operator who also furnishes local alarm service summarized as follows: "Q. Do you find it to be effective? A. Very much so. Q. Is it your view that local burglary protective service of that type is an effective means of protection of property? A. In many cases, more so than any. To clarify that, many businessmen have found that even with the best of silent alarms, the intruder still has occasion to do a certain amount of damage. Maybe he's caught and maybe he isn't. Whereby, the local alarm, depending on the nature of the business again, doesn't give him the opportunity to do anything. We've had instances where they've run right through plate-glass windows getting back out of the place. * * * The local alarm. It's that scare element, to get rid of them before they grab anything and run. By the same nature, there are businesses, such as some jewelry companies, and so forth, where their merchandise is within arm's reach, a broken window and a grab and a run could net them a profitable evening, and the best of silent alarms, no one could possibly respond quick enough. * * *" (W27a, R. 5328-29, 497, 595-96)

93. See also, *e.g.*, GX 318, R. 2416-17, 331-32.

for approved fire service, testified that the unapproved waterflow service furnished to subscribers was just as good as the service furnished since approval was received. "It is the same device, the same everything, * * *" (GX 337, pp. 34-35, R. 331-35) Another accredited central station witness, discussing burglar alarms, stated: "A local alarm has definite protective qualities from the standpoint of detecting and scaring a burglar. * * * A burglar is a sneak, who comes at night because he wants nobody to know he is there. When the alarm starts to ring, it scares him and he usually runs." (W12a, R. 4907, 497, 595-96) A Houston competitor of ADT who had added central station services to his local alarm business testified concerning solicitation of local alarm customers, "* * * they would come in and sell the man on the central station, when the central station itself don't necessarily protect the man or give him any more protection than he had before". (W37a, R. 5489, 497, 595-96)

Apart from the differing, competitively spawned, commercial predilections and rationalizations of those offering the various forms of electric protection, their testimony and writings underline the fact that the bulk of customers, none of whom the Government saw fit to rely upon as a witness, do not deem other electric protection systems non-competitive with the central station services because of any advantages or superior quality or efficiency urged for the latter. To the contrary, customers at most look upon the argued advantages and disadvantages as but one factor in the composite of considerations, premised not upon quality alone but also upon characteristics, price, and so on, which influence their selections.

To illustrate, one of the Government's leading witnesses, operating accredited central stations in New York and Philadelphia, characterized the reactions of customers (including those who have switched from central station to other systems such as local alarms) this way: "* * * [T]hey may feel that a bell ringing on the outside of the premises is adequate protection." (GX 330, R. 2718-19, 331-35) Another accredited central station witness summed

up the typical alarm company appraisal of the customer's view with the testimony that "In other words, to some laymen or businessmen, a burglar alarm is a burglar alarm whether it is a central station or something that rings in back of Joe's Pool Hall." (GX 337, p. 102, R. 331-35) An alarm company witness furnishing both local alarm and telephone answering service, when cross-examined by Government counsel as to prospects he solicited in competition with accredited central station firms, explained that they couldn't be classified as only local or central station prospects: "Well, a lot of times the customers don't know themselves whether they want central station or local. So, you have to convince them which is best for them. So, I couldn't say specifically which is which." (W10a, R. 4858-59, 497 595-96) A Government witness, the president of one of the oldest and best-known accredited central station concerns, operating in St. Louis and Cincinnati, testified that "According to the underwriters' reports, the ratio of protection given by the local alarms is good." (GX 326, R. 2568, 331-32)

(ii) Insurance Premium Discounts Available

In its arguments before the District Court, the Government relied heavily upon the availability of insurance premium discounts in connection with central station services as evidence of their superiority. To support its efforts to differentiate an allegedly separate market in "accredited central station services", the Government attempted to paint a picture of markedly larger discounts universally available impliedly for all central station services and not available for other forms of protection. In point of fact, the Government's picture was wholly misleading and the conclusions of the court below demonstrate that it never came to grips with the realities of this issue, which were established beyond cavil by the voluminous evidence of record.

a Burglary Protection Services

In connection with burglary insurance premium discounts, the Government's contentions were grounded almost exclusively upon the percentage discounts published in the Manual of Burglary Insurance by the National Bureau of Casualty Underwriters. The continuing theme of the Government was that higher premium discounts published "reflect the superiority of central station protection service over local alarm service" in the burglar field. To support this argument, the Government relied solely upon the premium discounts published for "mercantile open stock" insurance, urging that central station service afforded a maximum discount of 70% against a maximum discount for local burglar alarm service of only 35%. (GTB, p. 186 *et seq.*)

The percentage quoted by the Government for central station burglar service was for a Class A No. 1 installation with keys and was applicable only to floors protected above ground level. (GX 5, R. 1018, 327) But the Government's own witness, the Manager of the Burglary and Glass Division of the NBCU, testified that this type of central station installation is so seldom used that "you can eliminate No. 1". He testified that the most commonly used central station burglar system is a Class A No. 3 installation without keys,[94] for which the maximum insurance premium discount is 30% at ground level and 35% for floors above. He also testified that in connection with local alarm service he "would not be far wrong" in saying that a Class A No. 3 installation is the most common type. The No. 3 local installation affords a 20% discount at ground level (in comparison with 30% for central station) and 25% for floors above ground level (in comparison with 35% for central station). The No. 2 local alarm installation, apparently

94. A representative of Underwriters Laboratories, which keeps the records of all central station burglar systems certificated as eligible for insurance discounts, testified that more than 80 percent are No. 3 installations, both Class A and Class B. (GX 352, p. 54, R. 331-32)

slightly less prevalent than the No. 3, affords exactly the same percentage discounts at ground and above-ground levels as does the most commonly used central station service.[95] And as Government witnesses testified, often a potential customer can obtain only a Class B rating with central station burglar service because his premises are not within the limits of the guard response time necessary for Class A. Then a No. 3 installation without keys produces exactly the same discounts as the No. 2 local alarm installation.[96]

In addition, the NBCU witness testified that the discounts available in connection with bank burglary insurance are exactly the same for both local and central station safe and vault services. Moreover, he repeatedly pointed out that the largest burglar insurance discounts are not those published for central station services. To the contrary, for each private watchman employed during idle hours, a business or bank can obtain a 30% discount up to a maximum of three watchmen (the 30% discounts are applied consecutively against a declining balance). Even where such watchmen are not required to signal a police station or central station, three consecutive 15% discounts can be obtained.[97]

The Government also urged before the court below that "80% of the burglary insurance underwriters in the United States follow the rates published" in the NBCU's Manual of Burglary Insurance. (GTB, p. 186) This was not, however, the testimony of the Bureau's Manager. He testified that 89 insurance companies are members of the Bureau and that another 242 subscribe to the Bureau's services but need not follow its published burglary discount rates. In fact, as to those subscribers, the witness testified that he was quite sure that less than one-half apply the rates at all and many of those apply them in only one state but not the

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95. GX 346, pp. 55-57, R. 331-32; GX 5, R. 1018, 327.

96. GX 339, pp. 64-65, R. 331-35; GX 5, R. 1018, 327.

97. GX 346, R. 2989-91, 331-32; GX 5, R. 1012, 1014, 1016, 327.

others where they do business.[98] (GX 346, pp. 34, 49, R. 2992-93, 2995, 331-32)

Moreover, as previously noted, this same witness testified that the NBCU, in connection with burglary insurance premiums, allows a 25% credit or debit at the discretion of the individual insurance companies ("it is a flexible thing that the individual insurance company uses. * * *"). (*Ibid*, R. 2992-93) And contrary to the Government's arguments to the District Court that no premium discount is granted for direct connected, proprietary or telephone answering electric protection systems, this 25% credit can in fact be used for such systems, establishing that insurance credits are not available solely for central station and local alarm systems.[99]

The Government's *ipse dixit* that "80% of the burglary insurance underwriters in the United States follow the rates published" by the NBCU and that discounts are not available for direct connected, telephone answering and other electric protection systems was further disproved by the testimony of accredited central station witnesses, including those called by the Government. A Washington, D. C. central station operator called by the Government testified that proprietary burglar alarm systems qualify for the local alarm discounts. (GX 320, R. 2477-78, 331-32)

98. The witness testified: "We have many companies who are subscribers only in one state. Q. Does that mean that in the one state they grant the discounts and adhere to your requirements? A. That's right. Q. And in other states they go it alone? A. Right." (GX 346, R. 2995, 331-32)

99. The NBCU witness testified: "Q. To accord that 25% discount to an insured because he has a direct service or telephone answering service does not violate any rule or regulation, to your knowledge * * *? A. Well, the plan allows this flexibility. * * * Q. The granting of the discount or a portion of that 25% discount in such circumstances does not violate any of your rules or regulations, does it? A. I would have to say it does not." (GX 346, pp. 51, 78-79, R. 2992-94, 331-32) The same witness testified: "The alarm industry is concerned with the fact that telephone answering services are moving in and are a potential competitor for the business that they are trying to serve, so it is a competitive element. * * * [T]he number of people who are now engaging in telephone answering service * * * is on the increase." (GX 346, R. 2995, 2999, 331-32)

Another Government witness, the president of the company operating accredited central stations in both St. Louis and Cincinnati, testified that insurance companies use their own system of premium discounts rather than those set forth in the Manual of Burglary Insurance. (GX 326, p. 115, R. 331-32) Another central station witness from Chicago testified that the insurance premium discounts vary from one central station burglar service to another, that the amount of the burglar insurance premium discounts actually granted is controlled by the insurance companies, and that the discounts set forth in the Manual of Burglary Insurance are not "constant discounts".[100] A Los Angeles accredited central station operator testified that he frequently provides non-certificated central station service which does not meet the standards of Underwriters Laboratories but that the subscriber may "still get a premium reduction from his insurance company." (GX 362, R. 3207-08, 331-33) Still another central station witness testified that his company furnished burglar alarm service through a telephone answering service, as well, and that beyond the credit normally allowed for local burglary alarm service "it was up to the insurance company. We have actually had places where they received 50% discounts for our alarm in there."[101]

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100. "* * * an approved burglar alarm installation, central station or local, does not command a reduction in premium as set forth in that Manual necessarily, * * * from what I understand from the subscribers, because of the area, the burglary rate in that particular neighborhood, and what have you." (GX 347, R. 3009-11, 331-32)

101. GX 337, pp. 24-25, R. 331-35; see also GX 319, R. 2421, 2429, 331-32. Other alarm company witnesses confirmed that insurance discounts equal to or greater than those for local alarm service are also accorded to telephone answering, direct connected and other protection services and systems. Testimony was typically along these lines: "The only variation in the certification on these direct connects and the central office supervised [local alarm tied to another company's central station but not accredited service] * * * is that they often get a specific underwriting or credit for the direct connect or central office, and thereby pick themselves up an additional discount on their premium." (W17a, R. 5056-57; see also, *e.g.*, W5a, R. 4696; W9a, R. 4824, 497, 595-96)

Not only are burglary insurance premium discounts available for many protection systems other than accredited central station, but in fact those discounts viewed in their totality establish broad sliding scales that overlap on both ends of the spectrum those available for central station service. Even the few illustrations which can be presented here suffice to establish the fact that the discounts available for the various central station burglar services vary over a significant range and that competing services and systems in each instance bracket them, one or more such services affording higher, lower, and the same or essentially the same discounts.

Residential burglary insurance premiums can be reduced 10% whether the protection system is a local alarm or central station. (D 75(e), R. 4510, 496) In connection with broad form insurance coverage, a premises burglary alarm Class B No. 3 installation, without keys, is eligible for a 12% discount if connected to a central station and 10% if connected solely to a local gong or siren. The comparable classes of systems for safe or vault protection earn 11% discount for central station connection and 10% for the local connection. (*Ibid*, R. 4521) Also in connection with the broad form insurance coverage, the Government's National Bureau of Casualty Underwriters witness stated that as to the most commonly used protection systems, Class A No. 3 for both central station and local alarm, the discount for the former is 15% and for the latter 12%. (GX 346, pp. 62-63, R. 331-33; D 75(e), R. 4521, 496) In connection with mercantile safe and vault insurance, so-called partial systems are eligible for discounts of 22% or 27% for central station service without keys as compared with 20 or 25% for a purely local connection. (D 75(e), R. 4518, 496) In the mercantile open stock insurance classification, the premises burglar alarm central station systems without keys *may* earn discounts anywhere from 25 to 55%, depending upon how extensive the installation.[102] The com-

102. The percentages stated throughout this paragraph are without reference to the discretionary plus or minus 25% factor set forth above.

parable local burglar alarm system discounts overlap part of this range, affording discounts of from 15 to 35%, and can therefore even exceed the discounts available for particular central station installations. (*Ibid*, R. 4516) An approved bank safe or vault complete burglar alarm system can reduce insurance premiums by 50 to 65% whether connected with a central station or merely a local alarm tied to a gong. (*Ibid*, R. 4512) And on the high end of the burglar insurance discount spectrum, watchman service discounts can reach 90% against a maximum, and seldom used, 70% for central station services. (GX 5, R. 1012-21, 327)

The president of the largest non-defendant accredited central station company, called by the Government, summarized the discount situation when he testified, "there is very little difference [in available insurance premium discounts] between the local and the central office and that's what we are fighting for is to get a bigger difference between the locals and the central station." (GX 339, R. 2915, 331-35) When this testimony and the actual discount figures set forth above are evaluated against the previously noted fact that insurance companies grant to users of proprietary, direct connected and telephone answering service systems the same discounts accorded to local alarm subscribers (whether as published by NBCU or as determined within the discretion of the insurance companies), it is patent that as a matter of fact the Government's contentions, adopted by the court below, lack substance.

Further, the Government's argument that higher premium discounts published by the National Bureau of Casualty Underwriters "reflect the superiority of central station protection service over local alarm service" is not supported even by the testimony of the Government's own witness from that agency. He testified that where the discounts for accredited central station burglar service are higher they have been increased not because that type of service is superior to all others but only because it is *"a* high type of service" and in addition *because it "is also costly."* (GX 346, R. 2984, 331-32) Thus where higher discounts exist they reflect the underwriters' recognition

of the fact that central station service competes with other forms of protection and must maintain an interrelationship with those other services in terms of net cost to users if it is not to be ousted from the market.

Finally, in connection with the burglar field, the Government also argued to the court below that "insurance premium discounts are of the utmost importance to subscribers of central station protection service." In fact, the Government's own witness from the National Bureau of Casualty Underwriters, along with all the other witnesses, expressly contradicted this argument. He testified, "* * * I realize that a large majority of the insureds through the country will take the unapproved type of system. * * * I am amazed at how few there are [that want the approved central station service]." (GX 346, p. 76, R. 331-32) In addition, it was stipulated by the parties that only about 40% of all central station burglar alarm systems installed by accredited companies were certificated and therefore eligible for any insurance discount.[103] (GX 310, 312, R. 2263, 2268, 327)

b Fire Protection Services

With respect to the insurance premium discounts or credits available for various types of fire protection, the significant aspect of the record here is that there is no real basis for any arithmetic comparison of central station dis-

103. The testimony of a Los Angeles accredited central station witness graphically summed up the evidence which wholly belies the Government's contention as to the importance of insurance premium discounts in connection with burglary central station service: "In Los Angeles the approval is not the big thing. * * * Q. How is it that you are able to sell unapproved service since you are approved and qualified to sell approved service? A. Are you talking about fire, or burglary now? Q. Well, take burglary first. A. There again because we are approved only means that we are eligible to install an approved system. The cost is higher, and in a lot of cases the subscriber doesn't want to pay for it. A lot of cases the amount of discount they would save doesn't warrant the additional cost, the expenditures. A lot of cases they can receive their discount without it, a certain percentage of discount." (GX 337, pp. 26, 42-43, R. 331-35).

counts and those for other services and systems. As previously noted herein (p. 31), in the fire insurance field the underwriters' rating agencies establish eligibility requirements which vary from one locality to another, as do the discount or credit computation criteria which they publish.[104] Notwithstanding this fact, the Government predicated its arguments to the court below solely upon the testimony of a single witness from but one local rating agency, the Insurance Rating Bureau of the District of Columbia.

The Government urged that substantially greater percentage discounts are given for central station fire protection service. But, in fact, even as to this single metropolitan area, the witness testified that he was talking of "points" and not percentages. He explained that fire insurance rate discounts represent an amalgam of charges and credits based upon a point system.[105] Thus, he explained that points are added or subtracted in each of several areas of consideration, such as deficiencies in construction, faults of management, and general housekeeping, as

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104. GX 317, R. 2357, 2360-61, 2371; GX 318, R. 2396-97; GX 320, R. 2472; GX 326, R. 2556; GX 337, R. 2881; GX 343, p. 77, 331-35; R. 498-99, 565-66.

105. The Government urged that properties with sprinkler systems can obtain a 40% discount for central station waterflow and sprinkler supervisory service but only 12½% for watchman compulsory tour service. It also urged that non-sprinklered risks can obtain a 20% discount for central station automatic fire detection service but only 10% for watchmen on compulsory tour. (GTB, pp. 192-93) In fact, the District of Columbia Bureau witness upon whom the Government relied repeatedly emphasized that he was referring not to percentages but rather to "points". The witness gave this testimony: "Q. Now we spent some time this morning, Mr. Allebach, discussing a sprinklered premise rating schedule. There is just one thing I would like to clear up with respect to that. When you speak of the number of points that are used in grading a sprinkler system, am I correct in stating that these points are not directly percentage reductions from the base rate? A. Right. Correct. Q. And there must be some further computation and the inclusion of other elements both in the entire sprinkler system and the nature of the building that must be used in finally arriving at the base rate? A. That is correct." (GX 317, R. 2389, 331-32)

well as the character and effectiveness of the sprinkler system.[106]

The witness expressly told Government counsel that he could not say what credit would be given to a property owner with an automatic sprinkler system who utilized complete sprinkler supervisory and waterflow alarm service:

> "There again on the question of rate, there are so many things involved in the make-up of a rate that unless we specifically make an inspection and determine what those credits and charges are, it is very difficult to establish any set pattern * * * So that it is very difficult to set any pattern as far as the total credits are concerned." (GX 317, R. 2368-69, 331-32)

He further testified that in this "point" addition and subtraction process faults of management or general housekeeping, for example, could wipe out the entire credit given for central station fire protection service.[107] Moreover, this same witness testified that the 300 member insurance companies of the Bureau charge different insurance rates for

106. The witness testified: "[I]s that percentages or points now? THE WITNESS: I am sorry. It's 12½ *points* * * * [T]his grading schedule is set up on points. For instance, if the total water supply is inadequate, we could charge up to 20 points deficiency. If they have only an outside water motor gong as an alarm on this system, we charge 30 points for the alarm service and we charge 15 points for a single supply water system. * * * [Sprinkler supervisory and waterflow alarm service give a credit of] about 30 points." (GX 317, R. 2389, 2368-72, 2374-75, 331-32)

107. GX 317, R. 2368-75, 2390-91, 331-32. A Washington, D.C. accredited central station operator called by the Government confirmed the fact that the District of Columbia Bureau does not set fixed percentage discounts for central station fire protection services. He testified: "The local rating bureau having jurisdiction has the right to establish the credits in the final work sheets to the end premium. This becomes a rather involved computation that we have to basically stay out of. On the automatic fire there are published rates, but they again have to be applied in the development of the premium and the point of applying could make it lower than the published figure. So on fire basically the credit rates are largely dependent upon any calculations beyond the services. * * * As being applicable right across the board, I have never seen such a schedule published." (GX 320, R. 2472-73, 331-32)

comparable types of insurance with the result that a sprinklerized property with no alarm protection might obtain a lower rate from one company than it could from another even with the addition of central station alarm protection. (GX 317, R. 2382-85, 331-32)

The Government also contended before the court below that the District of Columbia Bureau "grants fire insurance premium discounts only to insureds using central station protection service." (GTB, p. 192) In fact, however, the Government's witness expressly testified that local and direct connected (remote station) electric fire protection systems are given discount recognition by the Bureau's member insurance companies. (GX 317, R. 2385-88, 331-32) In addition, the same witness dealt at length with the fact that discounts are available on fire insurance premiums where watchmen are employed during closed hours. (GX 317, R. 2369, 2371, 2374, 331-32)

When the fire insurance discount question is examined outside the District of Columbia, the sole area upon which the Government chose to focus, it is apparent that eligibility requirements and discount rates vary markedly. For example, the Factory Mutual Rating Bureau, sponsored by seven large mutual insurance companies (with approximately $80 billion of policies in force) specializing in coverage of thousands of large industrial plants, deems watchman service "the best type of supervision you could have" for fire protection, and one of its officials testified that "plants dependent on watchman service [are] in the majority."[108]

Under Factory Mutual's system of penalties and credits in rating a risk and computing premiums, maximum insurable risks have been established upon an order of descending values depending upon a series of factors, including the use by the insured of the various electric protective or other services. (GX 348, pp. 5-13, R. 331-32) Proprietary systems are accepted as the equivalent of accredited central station service, *i.e.*, proprietary systems qualify a user for

108. GX 348, pp. 1-4, 10-11, 13, 19, R. 3022-23, 331-32.

insurance against the same "maximum foreseeable loss."[109] In answer to the questions of Government counsel, the Manager of the Factory Mutual Rating Bureau testified as follows:

> "Q. Generally speaking, have the proprietary systems that you have inspected been of the same quality as central station systems? A. Yes, I believe so.
>
> "Q. As far as deficiencies in your standards? A. Yes, they have; the operational record, in my experience, has been as satisfactory."

Protection systems other than central station and proprietary create acceptable risks so far as Factory Mutual is concerned. These include, in addition to watchmen, auxiliary and remote station (direct connected), as well as telephone answering service. (GX 348, pp. 20-21, 44-45, 53, R. 331-32)

There is also abundant evidence of record that other rating agencies authorize fire insurance premium credits or discounts for users of protection systems and services other than accredited central station.[110] The Pacific Rating Bureau approves central station, auxiliary, direct connected and proprietary services, and subscribers to each of those services are entitled to receive credits against their fire insurance premium payments.[111] Accredited central station witnesses testified that proprietary, direct connected and auxiliary fire systems are entitled to insurance premium credits (while the credits accorded auxiliaries have

109. "* * * [T]he conditions [for proprietary] are exactly the same as central station service. Q. The maximum possible loss? A. Yes, this is correct, the maximum foreseeable loss weighted against the various deficiencies." So far as sprinkler supervisory service only, there is a variation. Factory Mutual allows premium credits of about 5% for central station and about 3% for proprietary systems. (GX 348, p. 44, R. 3023, 331-32).

110. See, *e.g.*, W16a, R. 5012; W34a, R. 5433-35, 5438-40, 497, 595-96; W41a, R. 5598-99; W46a, R. 5720, 497, 595-96; A61, R. 4353; B11, R. 4379-80; B12, R. 4381; B13, R. 4382; B19, R. 4387-88; B92, R. 4400-04; C42, R. 4445-47, 496.

111. GX 331, R. 2739-42, 2745-46, 2749-50, 331-35.

been the lowest, those earned by direct connected (or remote) systems "were just about 2 to 3% lower than that of a central station").[112] An accredited central station witness testified that he also furnishes leased direct connected systems which are approved and entitle subscribers to insurance discounts, primarily in connection with sprinkler supervisory and waterflow (valve alarm) service. (GX 319, R. 2429, 2431-32, 331-32) Another testified that he furnishes direct connected fire service to one of his largest customers, Mallinckrodt Chemical Company, on which that subscriber receives fire insurance premium discounts. (GX 326, R. 2549-50, 2585-86, 331-32) Still another testified that both direct connected and auxiliary fire systems are entitled to insurance premium discounts. (GX 331, R. 2750, 331-35)

Outside Washington, D. C., the sole area upon which the Government based its contentions, alarm company witnesses, including those from accredited central stations, were equally unable to give any specific percentages for insurance premium discounts covering either accredited central station fire protection or other competing services. For example, the president of a Chicago accredited central station, when called by the Government, gave typical testimony summing up the situation:

> "[So far as central station fire protection discounts,] * * * there are credits. I don't know what they are because fire insurance rating varies with the construction of the building. I don't think anyone can go to a given subscriber and say, 'you will get such and such credit if you put in this and this.' Q. So what you are saying, in effect, is that according to your information and your best belief, the discount, whatever it is, that is granted varies according to the local conditions found on the premises that are insured, is that right? A. That is right. * * *" (GX 347, pp. 18-19, R. 331-32)

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112. *E.g.*, GX 337, R. 2881; GX 340, p. 31; GX 355, p. 24; GX 356, p. 27; GX 357, p. 146, R. 331-35; W6a, R. 4726, 497, 595-96.

c Other Central Station Services

Finally, as previously noted (pp. 6-7, 47, 52, *supra*), many of the central station services included by the Government and the District Court in the allegedly relevant market do not afford any insurance discount recognition. For example, the variety of hold-up central station services included in the burglary category by the Government provide no insurance premium saving other than solely in connection with bank insurance. Similarly, in the broad range of industrial process supervisory services, the central station systems earn absolutely no insurance discount.

In the light of these facts of record, it is apparent that the Government's contentions that accredited central station services possess such superior quality and efficiency as to constitute a separate market are without substance. Lacking any basis in customer testimony, evaluation, or "buying habits", they are founded upon the quicksand of nothing more than the sales-oriented promotional arguments of businessmen who, not without precedent in other callings, espouse the advantages of what they sell while asserting the disadvantages of what their competitors sell. Similarly, the Government's reliance upon markedly larger insurance discounts available for each of the diverse central station services included in its allegedly "relevant market" can not be supported.

In purely conclusory and inadequate findings, the District Court uncritically adopted these contentions of the Government. Initially Judge Wyzanski narrowed the market by eliminating all "non-automatic systems", including watchmen, because he deemed them inferior in that they purportedly "differ not merely in technology but in utility, efficiency, reliability, responsiveness and continuity from all automatic arrangements."[113] (FF 29, R. 753) Unlike

113. As to these systems and services, he concluded that "markets for services rendered without tools and without education in the handling of them differ *toto mundo* from markets related to machines." (FF 29, R. 753) Contrary to Judge Wyzanski's supposition, these "non-automatic systems" are not furnished without tools. Indeed, one of the very same central station services included in the

"non-automatic systems", he did not purport to find the many other related electric protection systems to be inferior in these same respects to accredited central station service. He did conclude, however, without reference to or analysis of the evidence, that all forms of protection other than accredited central station services are "less integrated, advanced, * * * and safe." And he relied upon the mistaken belief that "underwriters have * * * adopted standards * * * and have offered premium discounts, of almost standard nature, based thereon. * * * Insurance companies allow their insured a far larger reduction of premium for accredited central station service than for other types of protection service." (FF 5, 33, R. 748, 754) Finally, without more, Judge Wyzanski adopted the sweeping conclusion that accredited central station services are therefore "qualitatively * * * a new class." (FF 35, R. 754)

With all due respect to the court below, we submit that in thus adopting the Government's contentions it could not have evaluated the evidence. Those findings are clearly erroneous and cannot support the court's conclusion that accredited central station services are so superior as to justify the total elimination from the market of other protection systems and services. Moreover, those findings further emphasize the fact that, contrary to the test of *Cellophane*, the District Court took an insupportable approach and applied erroneous legal tests to the problem of defining a market where the issue is power to control price or exclude competitors.

Thus, it is implicit in the findings of Judge Wyzanski that he recognized the fact of *functional* interchangeability between accredited central station services and the other services and systems—both "non-automatic" and electric

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Government's market definition and percentages—night watch or watchman's reporting service—is used to supervise and check watchmen in the performance of their duties. Other systems, such as the Detex clock and station-key mechanical recording system, are used for the same purposes. (*E.g.*, GX 348, p. 36, R. 331-32) And a number of the central station services included in the "relevant market" (*e.g.*, manual fire alarm and holdup) are not automatic but require intentional human intervention to trigger an alarm.

—which serve the same end uses, protecting against the same hazards. But, confronted with a record lacking any customer testimony in support of the Government's contentions, he made no real inquiry into the question of *reactive* interchangeability (i.e., will customers accept one service or system as a substitute for another)—an inquiry essential to determining "reasonable interchangeability or cross-elasticity of demand." Not only is there no evidence in the record that the bulk of users consider these other services and systems less efficient, reliable, useful, responsive, continuous, advanced or safe, but even if they did, contrary to Judge Wyzanski's approach, that alone would not resolve the issue.

More specifically, even though it may be conceded that each protective system or service may be deemed to have *some* peculiarities with consequent advantages or disadvantages, and even if it were assumed that they engender some preferences from one customer to another, the question remains whether such preferences are so substantial as to eliminate meaningful competition other than solely between accredited central station service concerns. *Cellophane* teaches, first of all, that unlike the approach below the question of superior quality must be evaluated in terms of *buyer preferences.* There the evidence demonstrated that some of the competing wrapping materials were considered by users to be superior in some respects while inferior in others. Different buyers preferred different combinations of qualities. But all measured these qualities against prices. *Cellophane* teaches as well, therefore, that the mere fact of buyer preference for one product or service is not determinative absent its resulting in the rejection by customers of alternatives considering the composite of price, use, characteristics and quality:

> "Cellophane differs from other flexible package materials. From some it differs more than from others. * * * It may be admitted that cellophane contains the desirable elements of transparency, strength and cheapness more definitely than any of the others * * *

Despite cellophane's advantages, it has to meet competition from other materials in every one of its uses." (351 U. S. at 377, 397-399).

Thus, even if accredited central station services were considered to be better, more accepted forms of protection with superior qualities for some purposes, that is no basis for excluding other systems and services from the market when the issue to be resolved is whether defendants have the power to control price or exclude competition in the trade in such central station services.

(c) Higher Prices

The Government also contended that definition of the relevant market could be founded upon "the cost differential existing between central station protection service and other types of protection." It carefully selected one or two specific examples, comparing a particular central station service (from among the dozens serving different end uses included in its "relevant market") and only one of several other competing protection systems or services, to urge that there was marked disparity in the cost to the user.[114] The unlimited ultimate conclusion argued by the

114. The Government focused exclusively upon burglar alarm service, central station versus local, and watchman service versus central station, wholly disregarding direct connected, proprietary, and telephone answering systems in the burglar protection field and all of the competing systems in the fire protection field. Thus, the Government argued, without any evidentiary citation, that "the *average* service charge for local burglar alarm service ranges from $5 to $8 per month. The average monthly service charge for central station protection service for small mercantile premises ranges from $20 to $30—as much as five times the local alarm charge." (GTB, p. 199) In fact, the Government's own "Burglar Alarm" 1961 revenue figure for all accredited central stations divided by the number of subscribers totals less than $42 a month. (GX 312, R. 2269, 330-31) Not only does that average obviously represent other than just "small mercantile premises," embodying as it does many large, multi-unit systems as well, it also includes the entire variety of intrusion central station services (bank safe and vault, mercantile safe and vault, and hold-up as well as the different premises burglar protection systems), many of which are more expensive than simple premises burglary

Government from these isolated, arbitrary comparisons was:

> "A particular and special demand exists for central station protection service; for were this not so, it is inconceivable that, in view of the price differential existing between central station service and local alarm service, any consumer would pay for central station protection service." (GRB, p. 8)

The District Court was lulled by these few selected and misleading examples and broad bootstrap conclusions urged by the Government into believing that all central station services are always more costly to subscribers than any other forms of protection serving the same end uses. Thus the court below found:

> "The annual charge paid by customers is several times as much for accredited central station service as for proprietary systems,[115] and *more than for any other types of protection service.*" (FF 33, R. 754)

And upon no more than this cryptic finding alone, the court below hastily and without reservation concluded that accredited central station services are "monetarily a new class" and subscribers to those services are "moving into the class of the rich." (FF 13, 33, R. 749, 759)

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system services and all of which were arbitrarily lumped together by the Government under the single heading of "Burglar Alarm". The fact is that the record affords no basis for any such comparison as that urged by the Government.

115. If the court's reference to "proprietary systems" was couched in the language of the protection industry nomenclature and therefore meant to be limited to those "miniature central station" systems located on the subcriber's premises, there is no record support for it. While it may be assumed that if such a customer mans the proprietary station with his own personnel, his service charges will be less than for central station service there is no evidence bearing upon how much less. Presumably the court was referring loosely to all other electric protection systems.

Again the District Court was undeterred by the evidence.[116] Not even the Government urged that central station services cost more than every other form of protection. To the contrary, the Government, in its efforts to narrow the market, devoted much attention to the fact that at least in some circumstances watchman services may exceed the cost of central station services.[117] Moreover, the court below ignored the fact that, even in the sole area mentioned by the Government, the cost of local burglar alarm service can actually exceed that of central station service, since the Government relied only upon *average* charges in its comparisons. In so arguing the Government disregarded the repeated testimony of alarm company witnesses that such comparisons are not meaningful. To illustrate, Government counsel engaged in this colloquy with a Chicago alarm company witness:

> "Q. What is your average installation service charge for a non-certificated local burglar alarm system? A. That is a low blow because I think I told you that there are very few average stores. If it's an eighteen foot front that will contain a door or single front door and transom, maybe two front windows, a rear door and a rear window and an exhaust fan, you can almost figure things about $150 to install it.
>
> "Q. And the service? A. The service might run six dollars or seven dollars a month.
>
> "Q. Well, do most of your installation charges and service charges on these non-certificated systems fall within a certain dollar bracket? A. No.
>
> "Q. Well, what is the range? What would be a minimum installation charge and service charge and

116. Throughout the trial, as in other areas of evidentiary inquiry mandated by *Cellophane*, Judge Wyzanski expressed his total indifference to the price relationships between central station and other forms of protection with such cavalier disavowals as, "Do you think I am going to go through all the economics of that in the findings and conclusions? Do you think there is one chance in 1,000?" (R. 380-81)

117. GTB, pp. 193-197.

a maximum installation and service charge on a non-certificated local? A. Well, let me put it to you this way, Mr. Levy: We can take a small dry goods store that will not have an insured program and will buy a $150 burglar alarm or even $125 alarm system. And a food mart will have an extensive installation and not be insured. It's quite common that they are their own insurers and, therefore, they are in the uncertificated bracket too and the job can run $500 * * * [I]t could run from $125 to $500 or $600 then.

"Q. How many $500 or $600 installations do you have in this category? A. Well, out of that bracket of 2400 I could say that there possibly are 400 of them which would be $500. * * *

"Q. What do the service charges run on these installations? We are speaking now of those in the $500 range. A. Well, I would say that they run anywhere from twelve dollars to twenty dollars a month. * * * [O]n a small installation like your $125 or $150 installation the certificated service might cost about $50 more to install and your maintenance for the same type of small installation would probably run a dollar a month more, instead of six dollars it would be seven dollars—or, generally, it's seven dollars maintenance fee and perhaps eight dollars for a certificated service." (W17a, R. 5087-91, 497, 595-96)

The witness then told Government counsel that his two largest central station accounts had installation charges of $750 and $550 and service charges of $35.25 and $38.00 per month, respectively.[118] (*Ibid*, pp. 125-25A)

118. A Houston competitor of ADT testified: "Q. * * * [H]ow much greater is your monthly service charge on central station as compared with your local bell? * * * Just the average. Would it be three times more per month? A. Well, it would be—there again, I don't know which one you are referring to, your minimum or your maximum. * * * I have got some few jobs that would be paying more than some of my central station subscribers, and they have a bell system. * * * Q. It would be hard to compare? A. It would be. You can't compare them." (W37a, pp. 39-40, R. 497, 595-96) An accredited central station witness testified: "Q. I gather from your

Thus, even as to local and central station burglar services (and even if the Government's *average* cost figures were valid), there is no proof that such services do not sell in a significant number of cases at the same or essentially the same prices. In addition, the record affords no definitive, statistical insight into the comparative prices (and volume of business at each price level) for the great majority of central station services and the other electric protection systems serving the same end uses, whether in the burglary, fire, or other fields. There is, therefore, no support for the broad conclusion by the court below, applicable as it is to all central station services in all circumstances, that they cost more, indeed several times more, than all other protection services and systems.

What the evidence does disclose is that, while concededly accredited central station service charges may in some instances exceed those of other same end use protection services and systems, customers have a wide range of prices from which to choose. Within this range, there are narrow price and quality differences between at least some of the numerous choices which exist. There are many different types of service, and with each type of service there are many alternatives. Thus, as to the electric protection systems, there are within each of the accredited central station, unaccredited central station, proprietary, direct connected, auxiliary and telephone answering services devoted to the same end uses many different systems made up of differing types and quantities of devices and equipment. And the prices charged vary commensurately within each type of service and overlap from one service to another. These sliding scales of prices within each type of electric protection service and system augment the degree of overlap produced when one (*e.g.*, accredited central station) is considered against the others (unaccredited central station, direct connected, proprietary, telephone an-

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remarks about the Police Academy that in some cases local alarms are priced almost as high as some central station services. A. In this case it would have been higher." (W6a, R. 4752-53, 497, 595-96)

swering, auxiliary, local or combinations thereof). The result of this significant variety of services and prices is a finely graduated but substantial spectrum of characteristics and prices, the outer limits of which extend beyond the cost of central station services on both ends.[119]

Moreover, even in those instances where accredited central station service charges to the subscriber are higher, insurance premium discounts can place the net cost to the subscriber on a level of parity with competing services and systems. Indeed, the Government, contrary to its basic contention that central station charges are higher, conceded in a different context that insurance premium savings often exceed the charges for installing the central station system and thereafter providing service.[120] Further, the evidence is uniformly to the effect that in exercising their elections among the competing forms of protection service, customers evaluate the price aspect in terms of net cost after any reduction in insurance premiums.[121] Thus, an accredited central station witness gave typical testimony attesting to this fact:

> "Q. Don't you find that when a subscriber considers your service he takes into account the amount by which his insurance premiums would be reduced? A. Definitely." (W6a, R. 4745, 497, 595-96)

Another testified to his furnishing unapproved waterflow service before his central station was accredited:

> "* * * We installed this waterflow device on their sprinkler pipes in their markets to indicate that their sprinkler had gone into operation. * * * No approval was ever required or requested on it. And of course

119. See Appendix A for record citations.

120. "It is not uncommon, particularly for those subscribers in 'target risk' businesses, to receive insurance premium discounts sufficient to pay the cost of installing and servicing a central station protection system." (GTB, p. 190)

121. *E.g.*, W35a, pp. 51-52, 127-29, R. 497, 595-96; GX 328, R. 2642; GX 337, pp. 26, 34, 42-43; GX 343, pp. 11-12; GX 357, p. 32, R. 331-35.

the monthly rental on it was low, to compensate for no approval." (GX 337, p. 34, R. 331-35)

The president of the largest non-defendant accredited central station company pointed out that insurance brokers help customers determine the impact of insurance savings to arrive at net cost figures for central station services in comparison with those for other forms of protection, such as watchman service. ("But you see, the insurance broker figures out how the owner will get his lowest rate * * *.") (GX 339, p. 20, R. 331-351)

The prejudicial import of the Government's leading the District Court into totally disregarding the effect of insurance discounts upon net cost to subscribers where central station service charges are higher can be graphically demonstrated with but one or two of the dozens of revealing computations available on the record here. Dealing squarely with the price area selected by the Government (*i.e.*, local versus central station burglar protection), we rely upon the most prevalently used types of installations and service in those categories (central station Class A No. 3 without keys and Class A No. 3 local)[122] for purposes of analysis. If we assume, alternatively, the placement of identical certificated local and central station premises burglar alarm systems[123] (10 units) upon the premises of a subscriber whose basic annual mercantile open stock insurance premium is $1,000, the following comparison results:[124]

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122. GX 346, pp. 55-57; GX 352, p. 54, R. 331-32. See also pp. 76-77, *supra*.

123. As the Underwriters Laboratories official called by the Government testified, in connection with the burglar protection certification requirements established by that agency the installations for both local and central station services, if placed upon identical premises, would be the same except for the transmitter and the extent of the installations or system would be identical in both cases. (GX 352, p. 52, R. 7450-51, 331-32)

124. ADT's target price lists show an identical advance service or installation charge for both the local and central station systems ($46 per unit times 10, totalling $460). The annual service charges are $516 for central station and $361.20 for local alarm service.

	Central Station	*Local*
Alarm Service Cost (5 years)	$3,040	$2,266
Net Cost of Insurance (5 years)	3,500	4,000
Total	$6,540	$6,266

Thus the net cost difference to the subscriber between central station and local would amount to $55 per year against an average annual burglary protection expenditure in both cases of about $1,250.

If the same type of computation is applied to a subscriber with more modest protection needs and smaller premises (*e.g.*, two units and basic insurance premium of $200 a year), then this comparison follows:[125]

	Central Station	*Local*
Alarm Service Cost (5 years)	$1,712	$1,388
Net Cost of Insurance (5 years)	700	800
Total	$2,412	$2,188

Amortizing the installation charge over the five year contract term (as the Government and its alarm company witnesses did—GTB, p. 194; GX 355, R. 3089-90; GX 356, R. 3105-06; GX 357, R. 3117-18, 331-33), the total central station service charge would be $3,040 as against $2,266 for the certificated local service. (E-1-E-2, R. 3246-50, 398-99) Accepting for this purpose the Government's reliance upon the Manual of Burglary Insurance, the central station and local alarm discounts at ground floor level would be respectively 30 and 20% (GX 5, R. 1018, 327). Consequently, the basic $1,000 annual insurance premium would be reduced in the former case to $700 and in the latter to $800.

125. Advance service or installation charge is $92 ($46 per unit) each for the central station and local systems. Annual service charge is $324 for central station and over the five year contract term, the total central station service charge would be $1,712 as against $1,386 for the certificated local service. The basic $200 annual insurance premium would be reduced 30 and 20%, respectively. (E-1, E-2; R. 3246-50, 398-99; GX 5, R. 1018, 327)

Thus the net cost difference to the subscriber between central station and local would amount to $45 per year against an average annual burglary protection expenditure in both cases of about $460.

Moreover, the insurance discounts have been established by the underwriters and their representatives with a view to maintaining the competitive interrelationship between central station services and other forms of protection in terms of comparative net costs. The Government's own witnesses testified to this fact. The National Bureau of Casualty Underwriters' official noted that where higher discounts have been established for some central station services it was because they are costly and the need for larger insurance savings was urged by central station operators. (GX 346, pp. 15-20, R. 2983-84, 331-32) And the president of the largest non-defendant accredited central station company testified that the central stations needed and sought larger insurance discounts to remain competitive with local alarm systems. (GX 339, p. 64, R. 331-35) The insurance discounts also work to keep other systems and services competitive with accredited central station services. Thus, another witness testified that when the Missouri Inspection Bureau announced that premium credits would no longer be accorded to direct connected fire systems along with central station service he complained that such a change "was suppressing competition" and the credits were then preserved for direct connections. (W6a, R. 4753, 497, 595-96)

When evidence of this character is examined, it is readily apparent that there is no price gap between accredited central station services and other forms of protection of the dimensions or universality pictured by the Government and court below. Moreover, the record shows that in many instances even where central station charges may be greater the difference is wholly or substantially eliminated by available insurance savings so that there is no significant difference in net cost to subscribers. But, further, even if there were record support for the District Court's erroneous conclusions as to the extent of any price differences, that would not establish that the Government has carried

the burden of proving lack of reasonable interchangeability or cross-elasticity of demand.

In *Cellophane,* the allegedly monopolized product cost substantially more than most of the substitute materials (from two or three to seven times as much as its chief competitors) and substantially less than two others. And yet this Court concluded, "We cannot say that these differences in cost gave duPont monopoly power over prices * * *" since, in the majority's view, there was record support for findings from which it was concluded there was reasonable cross-elasticity of demand for cellophane and other flexible wrapping materials. (351 U. S. at 396, 401, 412) The fact that a broad relevant market was found in *Cellephone* despite the pronounced price differences present there makes it clear that any price or net cost differences here cannot alone remove other protection systems and services from consideration in resolving the issue of power over price and competition in the central station trade.

(d) Particular Classes of Customers

The Government also argued that some classes of customers for protection services or systems will use only accredited central station services or, conversely, will not use such central station services at all. While the District Court made no express findings on the point, by implication it presumably adopted and relied upon the essence of these contentions.

The principal thrust of the Government's argument on this point was again in terms of a purported comparison solely of local and accredited central station services in the burglar risk field. It urged that "local burglar alarms are utilized for the protection of *small retail stores,* such as shoe stores, drug stores, candy stores, or second-hand clothing stores, with inventories valued at less than $15,000" and that, conversely, only concerns with inventories in excess of that figure subscribe to accredited central station burglar service. (GTB, p. 198) Factually, the record does not sup-

port any such market division between central station and local alarm customers even in this one area selected from among the many different central station services and end uses.

First, the Government offered nothing in the way of statistical data to buttress this argument other than the contradictory fact, previously noted (see p. 82, *supra*), that the bulk of the burglar alarm systems installed by accredited central station companies are not certificated as meeting the underwriters' requirements and therefore need not meet their more costly specifications. Second, while concededly *some* retail establishments may be so small as to be unlikely prospects for accredited central station burglar service while others may consider only central station as between that and local alarm service, there was no agreement even among the Government's accredited central station witnesses that any meaningful line of demarcation, whether based upon inventories of $15,000 or otherwise, could be drawn. Finally, the alarm company witnesses were almost without exception of the view that local and central station burglar alarm systems compete substantially with each other, and that establishments similar in business, inventories maintained, location and all other aspects significant to a choice of protective systems regularly make different elections as between these two forms of burglar protection.[126]

Even the following few examples of typical evidence on this point illustrate that there is a most substantial, even though concededly not 100 percent, overlap in the customers solicited and served by local and central station burglar concerns. A Government witness from the largest

126. See, for example, R. 360-63, 368, 370, 447-53, 466-70; GX 318, R. 2407-09; GX 329, R. 2680-81; GX 331, R. 2762-65; GX 338, R. 2895; GX 345, R. 2979-80; GX 362, R. 3205-06; W6a, R. 4751-52; W9a, R. 4830-31; W11a, R. 4865-66; W12a, R. 4901-04, 4909-10, 4917-18; W13a, R. 4926-28, 4933-36; W14a, R. 4952, 4955-58, 4963, 4980, 4982-83; W27a, R. 5340-41; W29a, R. 5362-63; W31a, R. 5409-11; W38a, R. 5493, 5517, 5526-27; W40a, R. 5568-69, 5577-78, 5583; W42a, R. 5643; W46a, 5685, 5701-03, 5705-07; W47a, R. 5722-23, 5727-31, 5733-34, 5744-47; W45a, R. 5663-64, 5673, 497, 595-96.

non-defendant central station company stated, "* * * every company, a client puts in a local alarm, is in competition with us. * * * [Local burglar alarm companies are] direct competitors." (GX 339, pp. 67-69, R. 2918-19, 331-35) Another accredited central station Government witness, interrogated as to the range of business establishments represented by his local alarm customers, answered that "they would be almost exactly the same range of types of business". (GX 329, R. 2691, 331-35) Still other central station witnesses testified that they protect "the same type" of businesses with both their central station and local burglar alarms, adding that they even offer both those services to the same prospect ("We have given different proposals on all three services going in, and they make a selection").[127] In fact, for its own installations the Government employs alternative specifications, permitting alarm companies to bid on the basis of either central station or proprietary systems, for example. (R. 493-94)

An accredited central station witness identified 25 of his customers as "small" pawnshops and "in the main, they were central station" (GX 343, p. 33, R. 331-35), while an unaccredited station operator testified, "I am talking about burglar alarms, my customers. Regardless of whether it is the central station or local, many of them have real good merchandise." (W9a, R. 4831, 497, 595-96) Defendants' internal records confirm the fact that they furnish their services to small establishments. For example, a 1952 Holmes file document stated that the "minimum gross revenue necessary to produce a 'break-even' point [on central station burglar alarm service] might, for example, result from a total of about 260 customers of whom 230 might be of the small mercantile or residence type, with 15 larger users and 15 banks." (GX 289, R. 2185-86, 327)

One of the Government's accredited central station witnesses gave this testimony:

"Q. * * * In your experience do you find that small jewelers, for example, some have local service and some

127. GX 341, R. 2942; GX 355, R. 3097, 331-35; W12a, R. 4902, 497, 595-96.

have central station protective service, burglary? * * * [T]ake one in one block, and then the jeweler in the next block, my question is, is it your experience that one might have local service and the other might have central station service? A. Yes.

"Q. And they do, do they not? A. Yes.

"Q. And that's true, is it not, in every other category of commercial and industrial business that we mentioned before, it's true of the liquor stores, it's true of the retail clothing stores, pawn brokers? A. Yes." (GX 333, R. 2801, 331-35)

An unaccredited central station operator, interrogated by Government counsel concerning accredited central station burglar competition, stated, "I would have to say that we met them competitively, but very often they might have been trying to sell a central, while we were trying to sell a local, * * *" (GX 340, R. 2930-31, 331-35) An accredited central station witness, asked whether, considering similarly situated businesses, some would take local and some central station burglar services, answered, "I think this is a very common occurrence. Except that the larger they become the more they lean toward central station service * * * Then when you come down [from the real large risk] to a somewhat smaller organization, this is where the field is most competitive. * * *" [128] (GX 336, R. 2860-61, 331-35) Another alarm company witness told Government counsel that while "larger firms, I believe, prefer to use central station services," the "smaller and medium-sized type of

128. The operator of an alarm company long engaged in local burglar alarm service and with a newly opened central station testified: "Q. * * * [I]s it fair and accurate in your estimation to say that at the very least there is an overlapping of the areas of service furnished by someone who is strictly in the local field and someone else who is strictly in the central station field? A. Well, when you say overlap, you mean could either a central station man or a local man sell that one customer? Q. Yes, that is. A. Yes. * * * Q. Describe for me the nature and size of your local burglar alarm subscribers generally. * * * A. We do business with small people and with the biggest and wealthiest people in the City of Philadelphia." (W14a, R. 4979-80, 4982-83, 497, 595-96)

subscribers, I believe, are prospects for both [central station and local alarm services]." (W31a, p. 58, R. 497, 595-96) Government counsel elicited from a local burglar alarm witness the fact that half of his 2500 customers would be of sufficient size to be central station subscribers and that in bidding for the business of such customers "we always run into them [the central station companies]." (W16a, R. 5013-15, 497, 595-96) Alarm customers from large stores, with inventories averaging $125,000 or more, testified that they have changed from accredited central station to local burglar alarm services (*e.g.*, 80% of the 140 Howard clothes stores have switched to local alarms). (W32a, R. 5418-20; W33a, R. 5423-25, 497, 595-96) The record is replete with evidence that large establishments, like the nationwide Kresge chain of stores, use local alarm services.[129] (*E.g.*, W12a, R. 4917, 497, 595-96)

The Government's witness from the National Bureau of Casualty Underwriters, the Manager of its Burglary Division, summed up the burglar alarm market realities in testifying, "* * * a competitive bid is one in which a central station would be involved as well as a local alarm and all across the country you have local alarms involved." (GX 346, p. 77, R. 331-32) Consequently, even if there are *some* burglar alarm customers who, as between these two services selected by the Government, will use only local or only accredited central station service, whether because of the value of their inventories or for other reasons, it is none-

129. ADT's contemporaneous business records confirm the fact that customers similarly situated in all respects pertinent to their selection of protection services and systems make different choices between accredited central station services and other forms of protection. ADT's subscriber records show establishments in the same business and city using different forms of alarm protection. (H-1, R. 3253-67, 410-11) In Tampa, where accredited central station service is available only from a non-defendant, ADT furnishes non-central station service to subscribers in the same categories as ADT central station subscribers in other cities. (GX 46, R. 1275-80, 327; A7, R. 496; I3, R. 496) 600 of ADT's 1200 local alarm users in Detroit are similar, from a protection viewpoint, to central station subscribers and, in the opinion of ADT sales personnel, should be using central station service. (R. 447-54)

theless clear from the record that as to large numbers of other customers, similarly situated in all salient respects, both these services are in effective competition for their business. And the Government, in its arguments to the District Court, made no effort to contradict the evidence of effective competition in the burglary field between direct connected, telephone answering, and unaccredited central station systems and services, on the one hand, and accredited CSPS, on the other.

Defendants submit that to the extent the District Court relied upon the contentions of the Government as to allegedly different classes of customers it was in error, both as a matter of fact and of law. Defendants never urged that all other forms of protection systems or services are effectively competitive with accredited central station services in *all* instances and as to *every* customer or potential customer. For example, it is conceded by defendants that while in the case of large industrial plants and warehouses central station and proprietary systems and watchman service compete head-on that is not true of many retail outlets where accredited central station service meets competition instead from unaccredited central station, local alarm, direct connected and telephone answering systems and services. Similarly, defendants never contended that *every* dollar of business won by these competing forms of protection was at the expense of accredited central station services. Rather defendants urged below and reiterate here that from the record as a whole it is clear that some part[130] of the business of furnishing the many other electric protection systems and services—and indeed a portion of watchman service—must be recognized as part of the same "relevant market" on the basis of truly effective competi-

130. Indeed, we believe the record establishes that most substantial portions of the business in other forms of protection are sufficiently competitive to infringe upon and in fact wholly dissipate any alleged power to control price and competition in accredited central station services, but in any event it was the burden of the Government to prove that the market could be limited to such services alone (*United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 424 (2d Cir. 1945)) and the court below erroneously relieved it of that burden.

tion which limits any alleged power to control price or competition in the trade in accredited central station services.[131]

In *Cellophane*, many flexible packaging materials were concededly not competitive with cellophane in all of its uses or as to all of its customers, but to the extent those other materials did compete in some uses and as to some customers they could not be disregarded. The important point was that in substantially all of its uses cellophane had "to meet competition", even though as to its most important single use, wrapping cigarette packages (accounting for 11.6% of duPont's sales), cellophane was dominant, with 75 to 80% of total sales for that use.[132] (351 U. S. at 399, 406, 424). Here the Government cannot point to a single central station service among the many it has lumped together which does not encounter competition from one or more other forms of protection devoted to the same end uses.

The decision in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945) is also *apropos* in connection with the "different classes of customers" point and other contentions of the Government. There the market allegedly monopolized was the manufacture and sale of "virgin" aluminum ingot. The court excluded from the market "secondary" ingot made from aluminum scrap be-

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131. The Government attorneys artfully avoided the fact of substantial competitive overlap between accredited central station services and other forms of protection. For example, in interrogating a witness whose central station had been unaccredited but who had testified at length to his winning customers in competition with ADT's accredited station (GX 324, R. 2497-500, 2502, 2505-09, 331-32), Government counsel phrased their questions as follows: "Q. Can you be *actually fully competitive* with an approved central station company if you don't have the approvals yourself?" (*Ibid*, R. 2513)

132. As here, the prices charged for cellophane were the same regardless of the particular customer, class of customers, or particular use. Consequently, even if other materials did not effectively compete with cellophane for the business of cigarette manufacturers so long as duPont's prices were regulated by effective competition from other materials in its other uses it did not have monopoly power over price even as to cigarette manufacturers.

cause Alcoa could regulate the volume of "secondary" through its control of the production of "virgin".[133] Significantly, however, the Court of Appeals concluded that absent this consideration unique to the product in question "secondary" would be in effective competition with "virgin" ingot notwithstanding price and quality differences, *the fact that some users would not consider "secondary" at all,* and the fact that the volume of available "secondary" could not be ascertained with any reasonable degree of accuracy (because of such factors as the use cycle of the original products and inevitable waste and attrition). (148 F. 2d at 423-24) And throughout his analysis, Judge Hand made it clear that the Government had the burden of proving that domestic "virgin" ingot could be considered alone for purposes of measuring market share and monopoly power.[134] He summarized these precepts as follows:

> "Taking the industry as a whole, we can say nothing more definite than that, although 'secondary' does not compete at all in some uses (whether because of 'sales resistance' only, or because of actual metallurgical inferiority), for most purposes it competes upon a substantial equality with 'virgin.' On these facts the [trial] judge found that 'every pound of secondary or scrap aluminum which is sold in commerce

133. This Court has characterized the rationale as follows: "Judge Hand found that the relevant market for measuring Alcoa's power was the market for 'virgin' aluminum; he refused to consider 'secondary' (used) aluminum. The reason for the narrow definition was that Alcoa's control over virgin aluminum permitted it to regulate the supply of used aluminum even though the latter should be actually sold by a competitor." *United States* v. *E. I. duPont de Nemours & Co.,* 351 U. S. 377, 396, n. 23 (1956).

134. To Government contentions that at each remelting of "secondary" the aluminum progressively deteriorates in quality, the Court of Appeals answered, "* * * the judge made no finding on the subject. Since the plaintiff has the burden of proof, we shall assume that there is no such deterioration." (148 F. 2d at 423) And again, in dealing with the significance of imported "virgin" aluminum, the court stated, "While the record is silent, we may therefore assume—the plaintiff having the burden—that, had Alcoa raised its prices, more ingot would have been imported." (148 F. 2d at 426)

displaces a pound of virgin aluminum which otherwise would, or might have been, sold.' We agree: so far as 'secondary' supplies the demand of such fabricators as will accept it, it increases the amount of 'virgin' which must seek sale elsewhere; and it therefore results that the supply of that part of the demand which will accept only 'virgin' becomes greater in proportion as 'secondary' drives away 'virgin'. * * * At any given moment therefore 'secondary' competes with 'virgin' in the ingot market; further, it can, and probably does, set a limit or 'ceiling' beyond which the price of 'virgin' cannot go, for the cost of its production will in the end depend only upon the expense of scavenging and reconditioning." (148 F. 2d at 424)

(e) Preponderant Shift to Accredited Central Station Services

Apparently to avoid the impact of the weight given customer shifts among various flexible wrapping materials in *Cellophane,* the Government argued "that in nearly every instance wherein a subscriber has changed the type of protection installed, there has been an upgrading of service; that is, from local alarm service to central station protection." And the Government prepared a table, based not upon the entire record but solely upon "the testimony of the representatives of the non-defendant central station protection companies," which purported to show a predominant shift to accredited central station services. (GTB, pp. 200-203)

Because the Government offered no testimony or other evidence from customers to demonstrate that they deem accredited central station services to constitute a separate market in which their buying habits establish an absence of reasonable interchangeability or cross-elasticity of demand for other forms of protection, the District Court seized upon the Government's contentions as to customer shifts as the sole purported evidence of "customer recognition of a difference in market":

"* * * [S]*ignificantly,* the preponderant shift is from the less integrated, advanced, expensive, and safe method of proprietary systems to accredited CSPS, thus indicating a customer recognition of a *difference in market.* This difference, to use a popular analogy, could be compared to moving into the class of the rich by changing from a compact six-cylinder car to a chauffeur-driven sedan. That is, there is a major *product difference* far transcending the obvious minimal cross-elasticity of demand."[135] (FF 13, R. 749) (court's emphasis)

The Court's conclusions cannot withstand scrutiny. First, unlike the facts in *Cellophane,* the Government can not claim that users frequently substitute one type of protection system or service for another. The evidence is all to the contrary[136] and, indeed, the Government has expressly conceded "the infrequency with which protection service subscribers change from one type of protection service to another." (GTB, p. 201) The reason is not, however, because customers recognize any difference in market. Rather the fact is that, after surveying the alternatives (as even the Government and District Court recognized they do—FF 12, R. 749) and choosing a protection

135. The court also concluded that, "As already noted, customers regard a change from proprietary alarms to CSPS as an entry into what is qualitatively and monetarily a new class, as when one changes from a Volkswagen to a chauffeur-driven Rolls Royce, or from a boarding house to a hotel named in a hotel association listing." (FF 35, R. 754)

136. The Government's own witnesses, as well as others, attested to the fact that only infrequently do users switch from one type of system or service to another. See, for example, GX 345, p. 65, R. 4513 ("If we had half a dozen we had a lot."); GX 331, R. 2778 ("This would be negligible."); W5a, R. 4692 ("Very little in either direction."); W9a, R. 4829 ("We usually have a customer until he decides to go out of business. * * * Usually if they decide on something they stay with it."); W14a, p. 29 ("* * * if the man will remain in business, usually you never lose him. He stays with you."); GX 337, p. 92; GX 338, pp. 15-16, R. 2892; GX 340, p. 30; GX 347, R. 3015, 331-35; W2a, R. 4635, 4643-44; W7a, R. 4772, 4782-83; W8a, R. 4800-01, 497, 595-96.

system or service, customers tend to stay with their first choice. A number of factors account for this. For example, the expense of installing an electric alarm system is substantial enough that users are slow to switch from one supplier's system to another and customers using non-electric forms of protection are similarly slow to invest in an electric system installation. Further, electric protection systems last decades if properly maintained, and those furnishing the related services not only provide such maintenance but install new parts or entire systems free of charge when needed.[137]

Consequently, in this respect unlike *Cellophane* (where frequent choices were available to customers because they quickly consumed expendable wrapping materials and could use a variety of different materials in their packaging machinery), here the selection of a protective service or system tends to be a "one-time" transaction—closely analogous to a homeowner's selection of a heating system. While he chooses between differentiated gas, oil and electric systems, once he exercises his election the home-owner is unlikely to switch to another system unless his wears out. But, as the current highly publicized "battle of the fuels" among suppliers of gas, oil and electricity attests, even though the heating systems using those fuels are not "self-same," even though they have differing characteristics, qualities, prices and allegedly different long-term net costs to users, they can nonetheless effectively compete with each other, influencing the prices charged for each.[138]

137. The president of the largest non-defendant accredited central station company told Government counsel, "That's right, we [retain title to the protection systems our company installs on the subscribers' premises]. The insurance companies require it and we have to maintain it all [at] all times. If anything goes wrong we have to whip it out and put in a new one, for which there is no charge." (GX 339, R. 2899, 331-35)

138. This Court has recently reiterated that in such a factual context "reasonable interchangeability or cross-elasticity of demand" may exist. Deeming that test of competition peculiarly pertinent on the facts (even though both broader and more narrow tests are available for merger purposes as opposed to the measurement of alleged monopoly power), in *United States* v. *Continental Can Co.*, 378 U. S.

Given such an essentially "one-time transaction context, evidence of competition must accrue largely at the point of initial selection by a customer. Clearly cross-elasticity of demand can exist in such a market context. Thus effective competition and reasonable interchangeability or cross-elasticity of demand are shown not so much by instances of users actually substituting one system for another but rather by such facts as this record demonstrates, *i.e.*, that various protective systems and services fulfill the same function, that companies furnishing the different systems and services solicit the same prospects, that other systems and services have impact upon the price of accredited central station service, that those selling central station and other systems and services regard each other as competitors, and above all that customers similarly situated in all respects pertinent to a choice of protec-

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441 (1964), the Court held that "competition between metal and glass containers for other than packaging beer was of the type and quality deserving of §7 protection," noting the following considerations. "It is quite true that glass and metal containers have different characteristics which may disqualify one or the other, at least in their present form, from this or that particular use; *that the machinery necessary to pack in glass is different from that employed when cans are used; that a particular user of cans or glass may pack in only one or the other container and does not shift back and forth from day to day as price and other factors might make desirable*; and that the competition between metal and glass containers is different from the competition between the can companies themselves or between the products of the different glass companies. These are relevant and important considerations but they are not sufficient to obscure the competitive relationships which this record so compellingly reveals * * * [T]he District Court employed an unduly narrow construction of the 'competition' protected by §7 and of 'reasonable interchangeability of use or cross-elasticity of demand' in judging the facts of this case. * * * Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to 'recognize competition where, in fact, competition exists'. * * * In differing degrees for different end uses, manufacturers in each industry take into consideration the price of the containers of the opposing industry in formulating their own pricing policy. * * * Moreover, price is only one factor in a user's choice between one container or the other. That there are price differentials between the two products or that the demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue." (378 U. S. at 449-50, 452-55)

tion systems or services regularly make different elections among them.[139]

Moreover, the record here does not show any such "preponderant" shift, upgrading or otherwise, to accredited central station services as urged and found below. Initially, even considering only the Government's table purportedly showing some 1500 alleged switches to central station service, based not upon the entire record but solely upon the testimony of selected witnesses, such findings will not stand up. For example, these switches were not shown to be to *accredited* central station services. In fact, in one of the numerically most significant cases it is clear that the switches were *not* to accredited central station service. Thus, the Government listed for American Fire Dispatch, Inc. 150 to 250 switches to central station service. (GTB, p. 202) The witness upon whose testimony this figure is based testified that he had operated his central station without any accreditation until just two months prior to his testimony and that the switches he described dated all the way back to 1956 when he started central station operation without any insurance approval. (GX 337, pp. 31-32, R. 331-35)

In virtually all of the other cases cited, it simply cannot be determined whether the switches relied upon were to accredited or to unaccredited central station services. In these circumstances the Government's selective and incomplete figures can in no way properly be used to urge that the market is limited to accredited central station services.

Further, the bulk of the switches listed by the Government consisted merely of changes by established customers of local alarm companies which added central station service and then merely connected the same systems located on the subscribers' premises to the new central stations.[140]

139. See pp. 119 through 131, *infra*, and Appendix B.

140. The testimony of accredited central station witnesses shows that there is little shifting to central station services by users of other services or systems where two different alarm companies are involved as opposed to switches between different forms of protection offered by the same company. (See, *e.g.*, GX 349, p. 31, R. 331-32)

Not only were these customers therefore not faced with the cost of installing a new alarm system but their prompt conversion to central station service demonstrates they were at some time prior thereto, if not always, prospects for central station service who nonetheless were using local alarm service instead.

These facts are demonstrated, for example, by the testimony of a witness who contributed 100-200 of the 1500 switches claimed by the Government below. (GTB, p. 203) The testimony of this witness from Michigan Still Alarm Company shows that his local alarm customers who switched to his new central station service had previously been good prospects for such service and, moreover, that as to wholly new prospects, whom he solicits for both local and central station service, once they make an election they tend to stay with that first choice:

> "You see in 1949, when we first went in this central station business, we had a good local [alarm] clientele, so to speak. So these people became excellent prospects to call on for central station service. After we, let's say, got established in the central station business, we found when we would go out to a prospect and give a price on both local and central station alarms, naturally encouraging the customer to buy the central station alarm, but at that point, if we weren't able to sell this man a central station alarm and we were able to sell him a local alarm, that particular customer hasn't as of yet become a good central station customer." (GX 351, p. 77, R. 331-32)

The testimony of another Government witness who added central station service to his local alarm business demonstrates the fact that local alarm customers were part of the same market in which central station services compete and that many of them elected to stay with the local service:

> "It was in 1958 and 1959. This is when we made a survey among our [local alarm] customers to find

out if they would be interested in coming into a central office. * * * [We surveyed] a sampling of about 300. * * * It was a group of each type of customer in each area, based primarily on the service charge and the nature of the business. The service charge that we made and the nature of the business they conducted. * * * We had about, I would say, 40 percent of the cards returned indicating they were interested. * * * [W]e got about 80." (GX 329, R. 2680, 331-35)

The testimony of other witnesses whose switch experience is most heavily relied upon by the Government was identical. When Morse Signal Devices opened its central station about 25% of its local alarm subscribers thereupon switched to central station (GX 362, R. 3225, 331-33). When Central Watch Service undertook central station service all of its existing watchman accounts were solicited and about 40% were converted to central station service (GX 357, R. 3136-38, 331-33).[141]

In such circumstances these switches obviously did not represent concerns which at a given point in time had suddenly grown or otherwise changed their circumstances and graduated from one separate and distinct market to another. The only thing which had changed was the nature of the service offered by their chosen protective company. These statistics then cannot support the finding (FF 14, R. 749-50) that there are "Two Nations" of customers for protective services.

In addition the Government's figures are misleading because the sample is selective. Nowhere did the Government or the defendants attempt to delineate the question

141. Included among the other Government witnesses who identified the customers switching to their central station services as being their old local service customers are representatives of Dayton Electronics Alarm and Signal Inc. (GX 318, R. 2394); Alarm Signal Company of Texas (GX 319, p. 29); Denver Burglar Alarm Company (GX 333, R. 2835); Potter Electric Signal Company (GX 345, p. 63); American Alarm Company (GX 349, pp. 31-32); Michigan Still Alarm Company (GX 351, R. 3046, 331-35) (100-200 customers).

of switching on any acceptable statistical basis. The record contains only sporadic recollections of a few witnesses. Defendants, if they wished to select their own examples, could cite the experience of the Damon Alarm Corp., whose representative's sole reference was to 10 or 15 ADT subscribers who changed over to his unaccredited service (GX 324, R. 2506-7, 331-32). They could point to the testimony of the witness from Certified Burglar Alarm Systems, who stated that roughly 10% of his 2400 local alarm subscribers were former central station accounts. (W17a, R. 5072-73, 497, 595-96) A representative of Dallas Burglar Alarm Co., who testified that about 8 or 10 of his present local customers were former central station subscribers, did not recall any switches the other way.[142]

Finally, there is evidence which flatly contradicts the assertion of Government counsel, upon which the court below obviously relied, that the only switches away from central station service are those necessitated by failing business conditions. (GTB, pp. 200-01). The witness from Howard Stores, operating about 140 stores throughout the United States, testified that they shifted from ADT approved central station service to local burglar service. (W33a, R. 5424, 494, 595-96) Robert Hall stores, which were protected by ADT central station service, changed to local burglar service (W32a, R. 5419, 494, 595-96). An installation of International Business Machines was switched from central station to a combination guard and proprietary system. (W36a, R. 5462-63, 5468, 497, 595-96) The major automobile manufacturers have been switching from central station to proprietary protection. (C97, R. 4467-68, 496)

In summary then, there is simply no adequate statistical evidence in the record to support the District Court's finding that predominantly the switches were from local to approved central station service—a finding which was the sole basis for its conclusion that customers regard accredited central station services as a separate market.

142. W21a, R. 5162; see also W23a, R. 5211; W31a, R. 5411-12, 497, 595-96.

Moreover, the record shows that a substantial number of the switches to some kind of central station service resulted not from a change in the customer's financial position, but rather from a change in his supplier's manner of doing business. And in any event, it is impossible merely by counting the purported number of switches to answer the ultimate question in this case—whether or not there existed the essential power over price and competition.[143]

(2) Other conclusions of the District Court demonstrate its application of an erroneous legal theory.

Other conclusions by the court below manifest its adoption of merger case market criteria in lieu of the reasonable interchangeability or cross-elasticity of demand test, which is not only prescribed by *Cellophane* but is dictated as a matter of economic and commercial reality where market definition is undertaken with a view to ascertaining power over price and competition.

For example, the District Court relied upon the fact that "there are trade associations uniting under one roof accredited central station protective service companies and not including the generality of all types of automatic alarm systems."[144] (FF 34, R. 754) Parenthetically, there is only one such association and its founder, when called by the Government as a witness, expressly testified that other alarm companies were excluded because they are "direct competitors." (GX 339, pp. 68-69, R. 331-35) But more

143. Assuming, *arguendo*, that the fact that some customers switch to accredited central station service might suggest that those particular customers consider such services to be in a different market, it does not follow that there is any such recognition by customers at large. To the contrary, as noted heretofore, even if some classes of customers will consider only central station service, the record demonstrates that others consider such services to be in the same market with other effectively competing systems and services.

144. As Holmes' brief, p. 31, points out, there are also trade associations numbering among their members accredited central station companies and those furnishing other forms of protection as well. (W46a, R. 5705-08; GX 346, p. 54; W13a, R. 4943-44, 497, 595-96; GX 339, p. 69, R. 331-35)

importantly, while this Court and other tribunals have concluded that "industry * * * recognition of the submarket as a separate economic entity" or that the fact that the "industry is recognized by its members and trade association as a separate and distinct industry"[145] may be pertinent considerations where the competition to be protected by Section 7 is at issue, no court has heretofore applied such a standard to market delineation where monopoly is the question. Patently trade association membership is in no way pertinent to determining whether customer reaction to substitute products or services creates reasonable interchangeability or cross-elasticity of demand, negating the power to control price or exclude competition.

In response to the Government's urging that "the officers and owners of central station protection companies consider central station protection service to be a business separate and distinct from other types of protection service,"[146] the District Court found:

> "Many (though by no means all) of those who are engaged in the alarm company business * * * [recognize] the accredited central station business *as a separate type of business.*"[147] (FF 32, R. 753-54)

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145. *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 355 (1962); *A. G. Spalding & Bros., Inc.* v. *FTC*, 301 F. 2d 585, 604 (3rd Cir. 1962).

146. GTB, p. 207.

147. This finding is accurate only to the extent that it portrays the testimony of alarm company representatives as characterizing central station service as "a separate type of business." In fact, as treated hereafter at pp. 119-31 and in Appendix B, more alarm company operators testified to the effective competition between accredited central station and other electric protection systems than failed to do so. See, *e.g.*, GX 329, R. 2690-91; GX 338, R. 2895-97; GX 339, R. 2913-14; GX 341, R. 2942; GX 345, R. 2979; GX 361, R. 3194-95; GX 362, R. 3205-06; GX 363, R. 3237-38; R. 360-63, 370, 447-53, 466-70; W6a, R. 4738-39, 4742-43, 4753; W11a, R. 4865-66; W12a, R. 4901-04; W13a, R. 4926-28, 4933-36; W14a, R. 4952, 4955-58, 4963, 4980, 4982-83; W16a, R. 5013-5015; W25a, R. 5263-64, 5269; W26a, R. 5283, 5303; W27a, R. 5316-17, 5340-41; W29a, R. 5362-63; W31a, R. 5409-11; W38a, R. 5493, 5517, 5526-27; W40a, R. 5568-69, 5577-78, 5583; W45a, R. 5663-64, 497, 595-96.

While thus in the same breath conceding the existence of a broader "alarm company business," [148] the court below nonetheless attributed weight to an irrelevancy, *i.e.*, that central station services may be deemed a "separate type of business." Just as in its references to a "product difference," in relying upon a conclusion as to "a separate type of business" the lower court was obviously disregarding the ultimate issue, to wit, whether substitute products or businesses are sufficiently competitive to limit the requisite power to control price and competition in the trade in accredited central station services.

In *Cellophane,* neither product differences among cellophane, waxed paper, glassine and other wrapping materials nor the fact that they are clearly "separate types of business" [149] stopped inquiry into their reasonable interchangeability or cross-elasticity of demand. But here conclusions of that character prompted the District Court to ignore that question and define the market without regard to evidence of customer buying habits which belie power over price or competition. The court's erroneous equation of a "business difference" or a "product difference" with a difference in "relevant market" throughout its findings reveals its substitution of the narrow, limited definitions permissible for Clayton Act merger purposes in lieu of the

148. Throughout this case it has been apparent that in fact the District Court and the Government recognize a broader competitive arena than just accredited central station services. For example, the court below characterized defendants as "the dominant factors in the *protective industry.*" (FF 31, R. 753) Further, the lower court found that acquisitions by ADT of protection companies contributed to the asserted dominance of the defendants in the narrow market defined. While conceding that the bulk of those acquisitions (20 of 22) were not shown to be accredited central station concerns, the court nonetheless designated them as "competing companies" and "competitive enterprises." (FF 48-51, R. 757-58; CL 6, R. 761; OL 10, R. 764). Even before this Court, the Government has referred to "monopolization of the *alarm business.*" (GJS, p. 17)

149. Unlike the manufacturers of the wrapping materials considered in *Cellophane,* as previously noted, accredited central station companies generally furnish other forms of protection, particularly those based upon the same electric systems placed upon subscribers' premises for central station service.

monopoly market tests of *Cellophane*. Such findings and conclusions afford no basis whatsoever for excluding other protection services and systems from the market.

c. The record as a whole establishes the requisite interchangeability and cross-elasticity of demand, demonstrating that the Government has failed to carry its burden of poof as to the relevant market and monopoly power.

(1) Customers similarly situated are solicited by and make different elections among accredited central station services and other effectively competing forms of protection.

While the Government argued that there is in fact no competition between accredited central station services and other forms of protection, the District Court did not so find. To the contrary, while its application of erroneous legal tests led the court below to disregard or minimize crucial evidence of competition as not pertinent to its views of appropriate market definition, the court nonetheless made findings which attest to the competition with other forms of protection.

While greatly understating the fact that customers similarly situated regularly make different choices between accredited central station and other protection services and systems, Judge Wyzanski expressly found that customers "have options" and "exercise their options differently."[150] He even conceded that the Government clearly had not proven any lack of price interrelationship among these competing services and systems. Thus he found that there was "obvious possible" cross-elasticity of demand and that

150. "Business or other enterprises located in cities where there is CSPS have the option, of course, of using watchmen, watchdogs, automatic proprietary systems confined to one site (often, but not always), alarm systems connected with some local police or fire station, often unaccredited CSPS, and often CSPS. There are business or other enterprises which in the same city exercise their options differently for different sites in that city." (FF 12, R. 749)

defendants "do not have unfettered power to control the price of their services, even where they have no competition from other CSPS companies." (FF 13, 46, R. 749, 756) But upon the basis of his unsupported conclusions that accredited central station services embody "a major product difference" and are "qualitatively and monetarily a new class" to which there is a "preponderant shift * * * indicating a customer recognition of a difference in market" (FF 13, 35, R. 749, 754), Judge Wyzanski rejected any further inquiry. He summarily concluded, without any evidentiary analysis, that the competition of "other alarm or watchmen services" is "fringe competition" and that the "obvious possible" cross-elasticity of demand must be "minimal." (FF 13, 46, R. 749, 756)

Indeed, the character and volume of evidence establishing the fact of substantial interchangeability or cross-elasticity of demand could have been thus ignored only if, as he stated, Judge Wyzanski rejected that concept, laboring under the misconception that "cross-elasticity of demand * * * went out of the effective vocabulary of antitrust defendants, [and] is also an aberration." (R. 543-44) In fact, the record here compels the conclusion that there is effective competition between accredited central station services and other forms of protection, including the other closely related electric protection systems and services.

Operators of non-defendant alarm companies (both accredited and unaccredited central station as well as non-central station) testified that accredited central station services are competitive with unaccredited central station, proprietary, direct connected, auxiliary, local, telephone answering and watchman services and systems, and that they regularly solicit the same prospects, winning some and losing some. Witnesses selling these protective services and systems testified that establishments similarly situated in all pertinent respects—line of business, inventories, character of neighborhood and premises, and nature and extent of protection needs—consider and use different protective systems and services. Their business records, too, substantiate these facts. While the Government eschewed all cus-

tomer testimony and offered no statistical evaluation bearing upon customers' buying habits, the defendants did offer user testimony and surveys which, with the evidence from alarm company witnesses and records establish the fact of substantial interchangeability. So complete is this variety of evidence bearing upon the *Cellophane*-prescribed inquiry as to customer recognition of and reliance upon interchangeability in systems and services that we have set forth in Appendix B a partial summary, with full record citations, to which we respectfully refer the Court.

(2) Cross-elasticity of demand is evidenced by marked price sensitivity and response among accredited central station services and other effectively competing forms of protection.

Apart from this voluminous evidence of effective competition, the record is also replete with most significant proof of the pronounced price interrelationship and sensitivity between accredited central station services and these other forms of protection. In determining a market for the measurement of alleged monopoly, this Court in *Cellophane* noted, "What is called for is an appraisal of the 'cross-elasticity' of demand in the trade." (351 U. S. at 394) And both the majority and dissenting members of the Court were unanimous in agreeing that

> "An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market." (351 U. S. at 400, 417-418)

Where the dissenters differed with the majority was in the application of this concept to the facts. More specifically, the dissenters viewed the facts as disproving "price sensi-

tivity" between cellophane and other wrapping materials in that the latter did not respond to "duPont's repeated and substantial price cuts." [151]

On the record here, however, there is abundant evidence, though totally ignored by the District Court and assiduously avoided by the Government,[152] of "price sensitivity". The record shows that in order to avoid loss of business, accredited central stations and their competitors offering other forms of protection respond to each other's prices

151. "[F]rom 1924 to 1932 duPont dropped the price of plain cellophane 84%, while the price of glassine remained constant. And during the period 1933-1946 the prices for glassine and waxed paper actually increased in the face of a further 21% decline in the price of cellophane." (351 U. S. at 417) Similarly, the principal critic of *Cellophane*, Professor Stocking, objected to the result reached there for the same reasons, stating that if cross-elasticity were high "the prices of such wrapping materials [other than cellophane] would have moved concurrently to prevent, as Chamberlin says, 'incursions by one seller, through a price cut, upon the markets of others'." Stocking & Mueller, "The Cellophane Case and the New Competition," 45 Am. Econ. Rev. 29 (1955). Elsewhere this same commentator has stated: "Cross-elasticity reflects the extent to which price changes in one product affect the amount of another product that buyers will buy. Where the cross-elasticity of demand for rival products is great, a decline in the price of one decreases the sale of the other and *may* lead to a decline in price. The production of numerous similar products with a high cross-elasticity of demand may perform about the same economic function as does the existence of numerous sellers of the same product. * * * A more reliable test of monopoly power than the percentage of a broad ill-defined market that a particular seller holds is the one set up here—the relative price movements of the single seller's product and of 'competing' products. Stated in technical terms the question becomes: Is the cross-elasticity of demand so low that duPont can price cellophane independently and still make monopoly profits in selling it?" Stocking, "The Rule of Reason, Workable Competition and Monopoly," 64 Yale L. J. 1107, 1110-11, 1143 (1955).

152. Not once in their voluminous papers submitted to the court below did Government counsel mention "cross-elasticity of demand", even to argue that it was slight or non-existent. They sought to hide the question of price interrelationship by disposing of reductions in ADT's target prices necessitated by the offering of competing forms of protection with such offhand and ingenuous statements as, "* * * the fact that a consumer may disregard a central station protection service proposal even after the defendants have reduced prices below MBR also fails to evidence competition." (GRB, p. 12)

and price changes. Those furnishing competing services and systems are able to and do respond to price cuts by the accredited central stations with price cuts of their own. The record shows instances of business lost or gained as a result of price. The record shows that accredited central stations were unable to sell to or retain the business of particular subscribers because of the prices of other forms of protection. Conversely, it discloses that as their prices were reduced, business became available to accredited central stations or those other competitors. The pull and tug of price competition are shown to permeate the entire market, geographically and by type of service and customer, as demonstrated by even the following few examples.

The overall extent of the price interrelationship between accredited central station services and other systems and services is suggested only in part by statistics compiled from ADT's contemporaneous business records[153]—evidence which Judge Wyzanski erroneously characterized as "highly immaterial and most irrelevant," declaring "It is not going to affect me in the slightest." (R. 432-42) For example, in 3,678 recorded instances of competition between ADT central station services and offerings other than accredited central station service, ADT's offer was rejected in favor of the other service in 1,095 instances (30%); in the remaining 2,583 solicitations ADT succeeded, but only by quoting a price below its target rates.[154]

153. ADT maintains "Forms 701" designed to record instances where competition is encountered in soliciting a prospective customer. Because they are required of sales personnel whenever a contract is taken at less than the target or "Minimum Basic Rate", these reports accurately reflect the number of such transactions. Where, however, the prospect has taken a competitor's service or system, reports often have not been filed by salesmen so that the statistics fail to reflect all instances in which ADT was the losing bidder even though its prices and those of the competitor were adjusted in response to each other. (R. 471-74, 613; E9, R. 4541-42; C31, R. 4423-31; AE, R. 3995-97; F68 to F80, R. 3273-590, 442). As a competitor of ADT testified, "I just know the jobs we get, * * * [The salesmen] don't come in and tell me the ones they are losing. * * *" (W37a, R. 5483, 497, 595-96)

154. F69-70, F75-76, R. 3294-98, 3309-465, 442; R. 436-37.

In 16 cities where there is no other accredited central station, ADT faced at least 841 competitive solicitations and lost the business in approximately 40% of those instances. In some of these cities, ADT lost almost 67% of such solicitations (*e.g.*, Salt Lake City, San Diego). In order to win business at all, ADT was forced to reduce the prices for its services below its target rates; in 1963 from 18 to 57% of its business in these cities was at reduced rates. Defendants' lack of control over price and necessary responsiveness to non-central station competition are further evidenced by the fact that from 1957 through 1963 ADT was forced by competition to reduce its regular rates for its central station service in 24 to 29% of its total solicitations in all cities where it alone offered such service.[155] (F68-80, R. 3273-590, 442). And although ADT in 1961 had accredited central station competition in only 23 cities (FF 7, R. 748), just 18 of its 123 stations achieved its target rates. (GX 222, R. 2033-38, 327)

And turning from the general to the particular, these incomplete and understated statistics are supported by illustrative instances detailing the nature and the day-to-day workings of the price interrelationship and sensitivity between accredited central station and other services and systems, together with defendants' awareness of those facts. That the underwriters' agencies recognize competition with the other forms of protection and have published insurance discount schedules aimed at keeping the net cost of accredited central station services related to that of other services and systems has been previously noted (see pp. 81-82, 99, 104, *supra*). Moreover, accredited central

155. The impact of such non-central station competition in cities where ADT has the only accredited central station is underscored by the extent of the reductions from ADT target prices necessitated to obtain business. For example, in Oklahoma City ADT's total annual service charges declined from 93.6% of the target (minimum basic rate) to 85.0% in 1961 and its total advance service charges declined from 93.6% to 65.2% during that period (similar declines occurred in Columbus, Ft. Wayne, New Brunswick, Scranton, Sioux City and Worcester, to name several). (GX 222, R. 2033-38) Yet by the Government's market definition, adopted by the District Court, these are cities in which ADT has no competition but rather an absolute monopoly.

station concerns are profoundly concerned with this competitive price interrelationship and have sought larger insurance discounts to remain competitive with local alarm services. (GX 339, R. 2918, 331-35) Further, the record shows the continuing preoccupation of defendants' sales personnel with the price levels not only of other accredited central station but also non-central station companies and their concern lest they price themselves out of the market, as noted earlier (p. 147 and Appendix B).

More importantly, the testimony of the many alarm company witnesses, including those called by the Government, details throughout the specifics of the price sensitivity and responsiveness between accredited central station services and the other competing forms of protection. The following examples of representative testimony serve to illustrate the variety of evidence introduced as examples of the market-place workings of cross-elasticity which underlie the more general statistics compiled from contemporaneous business records:

(a) A Government witness operating an unaccredited central station testified that ADT complained that his prices were too low in relation to accredited central station service charges. He also testified that whenever ADT raises its prices, eight or ten ADT subscribers call him for his unaccredited service. In addition to other ADT customers whom he won, this witness described ADT's loss of a warehouse which switched ten sprinkler and four burglar alarm systems to the witness's unapproved central station service because of its lower price. In the face of this competition, ADT reduced its prices quoted to this customer but still lost the account. (GX 324, R. 2503, 2505-09, 331-32)

(b) An accredited central station operator testified that before his station was accredited in August, 1952 and later, local ADT representatives purportedly voiced objections in 1950 and 1951 to his winning accounts from ADT and made inquiries as to the prices he obtained for his unapproved central station installation and service charges. (GX 351, R. 3049-51, 331-32)

(c) Another central station witness testified that before his station was accrediated he furnished telephone answering service with unapproved systems in competition with central station service but at a lower rate designed to compensate for the absence of insurance approval and discounts. (GX 337, p. 34, R. 331-35)

(d) A Boston alarm company operator, furnishing local alarm, direct connected, and formerly telephone answering service until the recent opening of his unaccredited central station, testified that in competition with accredited central stations "* * * we are forced in terms of competing to try to evaluate what these subscribers' needs are insurancewise, and try to project what his premium may be, try to project what discount will be available through other companies and what discount will be available through us, and if necessary, to arrange our prices accordingly to bring us in the competition picture, but in doing this, we have to make our prices in many cases very, very low, * * *." He also testified that ADT has to reduce its prices in competition with him. (W35a, pp. 51-52, 127-29, R. 497, 595-96)

(e) A witness furnishing telephone answering service testified to instances in which ADT had to reduce its prices in competition with his service, including a fire alarm installation for IBM and the conversion of another customer's local alarm system with the addition of holdup alarm service. (GX 340, pp. 47-48, 57-61, R. 2925-26, 331-35)

(f) A witness operating an unaccrediated central station in Detroit testified that ADT frequently reduces its prices and amortizes its advance service or installation charges[156] in competition with his service. (W12a, pp. 71-79, R. 6996-97, 497, 595-96)

156. Over 40% of ADT subscribers paying amortized advance service charges are in cities where ADT has the sole accredited central station, and over 43% of the amortized charges are derived from installations in such cities. (RR, R. 3833-37, 576)

(g) A witness from an alarm company in Oakland testified that when he found ADT's price for industrial process supervisory central station service was the same as his price for telephone answering service of that type he reduced his price. (W13a, R. 4949, 497, 595-96)

(h) Another alarm company witness stated that ADT had to amortize its central station installation charge over five years in competition with his direct connected burglar service. (W15a, pp. 59-60, R. 497, 595-96)

(i) A witness whose alarm company furnishes telephone answering service testified that while he competes with central station service in areas where a telephone answering office is close enough to subscribers to permit line charges of $5 a month that is not true where there is no "answering service close in the area where we could compete. If an answering service is—if you don't have an answering service in the same telephone exchange, then you have to get a line from one exchange through into another exchange. Our line may run all the way from, oh, $10 to $15 a month." (W16a, pp. 34-38, 51-52, 68, R. 5004-6, 5010-11, 497, 595-96)

(j) An alarm company witness who offers direct connected and local alarm service in Chicago complained that a non-defendant accrediated central station firm "was hard to get along with price-wise. In other words, * * * they would offer central office alarms very close to the cost of operating a local alarm, and the customers would be almost obliged to take a central office service for twelve, thirteen, fourteen bucks a month in contrast to our service, and pick up a few extra bucks on the insurance premium." (W17a, R. 5083, 497, 595-96)

(k) A St. Paul and Minneapolis alarm company operator testified that a liquor store, having subscribed to his local alarm service at a new outlet planned to can-

cel ADT's approved central station service at its first location until ADT "immediately came in and lowered their price to meet ours [quoted both telephone answering and approved local alarm service] to hold the contract." (W26a, R. 5303, 497, 595-96)

(l) A Houston alarm company witness offering local and unaccrediated central station burglar alarm service testified that ADT and others, in competition with him, have reduced their central station bids so that ultimately his installation charges "will be cut in half" and that a non-defendant accrediated central station's "bid prices would be substantially below mine a lot of times. * * *" (W37a, pp. 61-63, 69-70, R. 497, 595-96)

(m) A Kansas City alarm company witness furnishing unaccrediated central station and local alarm services in the burglar field declared that he tries to price his services in relation to ADT's "because we do have competition" and "if you come relatively close to their price a customer might go a little over and take their service." And he testified further that "there are a lot" of instances where ADT reduces its prices in competition with him. One was Interstate Wholesale Drug Company where "We went in there with a price of something like $1,000 or $1,100. And it seemed that everyone thought they had this particular job from time to time to another. From us to Damon [another unaccredited central station and local alarm company], and ADT finally ended up with it. ADT came down, way down, below their original price of what they had tendered and consequently it was way below our price of what we bid." (W40a, pp. 59-67, R. 497, 595-96)

(n) An alarm company witness furnishing local, direct-connected and telephone answering service in the burglar field testified to a bid he gave one of his customers who moved to a new location. Thereafter, at a time when it had no other type of alarm business in Pittsburgh, Holmes quoted its price for central station burglar service. Then the witness and Holmes both en-

tered additional bids. The witness testified that ultimately "I found that my price was cut down to a point where I made up my mind I couldn't take it at that price." (W5a, pp. 98-101, 105-106, 121, R. 4686-87, 4695, 497, 595-96)

(o) ADT was forced to lower its prices for sprinkler supervisory and waterflow alarm service in soliciting the business of a St. Louis concern because Notifier, which furnishes direct connected systems and service deemed by the prospective subscriber to be similar to central sttaion service, was quoting more favorable prices. (GX 202, R. 1938-39, 327; W41a, R. 5584-85, 5593-96, 497, 595-96)

(p) A local burglar alarm company witness in Kansas City, Missouri testified that the 20-state Katy Drug chain, which used central station service, asked for his bid on local alarm service when notified that there was to be a price increase in central station service. When the witness entered his local alarm bid, the central station charge was reduced in order to retain this account. (W7a, R. 4780-81, 4783, 497, 595-96)

(q) An alarm company witness furnishing local alarm and telephone answering service in Baltimore testified that a non-defendant accrediated central station company reduces its installation charges "a lot of times" when quoting in competition with him—"I know of one instance he gave it to the man for nothing, just to keep me out." (W10a, R. 4857-58, 4860, 497, 595-96)

(r) A Los Angeles alarm company witness furnishing unaccrediated central station and local alarm service in the burglary field outlined illustrative instances in which ADT reduced its prices in competition with him so "that we had to cut our bid down and put it in for practically half of what we bid" or lose the account. (W45a, pp. 39-44, 76, R. 497, 595-96)

In addition to testimony of this character contemporaneous business records detail literally hundreds of in-

stances where accredited central station charges had to be reduced because of the competition of other systems and services; where other systems and services responded to accredited central station price cuts by reducing their prices; where accredited central station service subscribers have substituted other systems and services when they deemed accredited central station prices to have become too high; and where other systems and services had a limiting effect on existing or proposed accredited central station charges.[157]

In the face of such facts and on the record as a whole, we submit that it is established that users of protection services and systems, as in many other markets in common experience, operate on a combination of price, characteristic and quality considerations. Accredited central station services can win business from other forms of protection only if their net cost to subscribers is low enough to make their particular characteristics and quality worth the price. The optimum combination of properties and of net cost is what users seek. Those similarly situated make different appraisals and selection is not necessarily a scientific process. Clearly no single characteristic or quality nor price alone wholly governs selection by large numbers of customers.

Even if the record established that the differences between accredited central station services and other forms of protection were as great as the Government urged, that can be no basis for limiting the market solely to such services when the proof of customer buying habits demonstrates competition and the degree of interchangeability or cross-elasticity of demand manifest here. Apart from adopting the Government's factually unsupported contentions as to

157. See, for example, GX 177, R. 1646; GX 180, R. 1704; GX 182, R. 1743; GX 185, R. 1781; GX 187, R. 1801-02, 1804-12; GX 188, R. 1816; GX 195, R. 1889; GX 287, R. 2178-80; GX 288, R. 2181-83; D75(b), R. 4507-08 (this exhibit gives the identity and date of approval for all central stations accredited for burglar service of one or more types, permitting identification in the other exhibits of competitors not in the "relevant market" found below); A41, R. 4338-39; C76, R. 4460; D15, R. 4472-74; E70-72, R. 4575-78; E7, R. 4534-37; E8, R. 4538-40; E61, R. 4573.

such differences, the District Court compounded error by assuming that the evidence of competition and interchangeability of cross-elasticity of demand could be disregarded.

The court's erroneous approach is highlighted by its repeated references to chauffeur-driven Cadillacs and Rolls Royces as constituting a market separate and distinct from the market for all other automobiles. (FF 13, 14, 35, R. 750, 754) In a day, however, when Chevrolet Caprices, Ford Galaxy 500's and others are driven by chauffeurs, it cannot merely be assumed that in the responses of customers those other automobiles lack "reasonable interchangeability—price, use and qualities considered," and are therefore to be excluded from the market. Were such standards of market delineation adopted for purposes of determining monopoly, it would follow that the national economy is honeycombed with monopolies vulnerable to the whim of antitrust enforcement personnel. Coca Cola, with its secret syrup formula, would have a monopoly notwithstanding Pepsi Cola (whether or not "Twice as much for a nickel, too"), Royal Crown Cola and a host of lesser known local and regional cola drinks of differentiated character, quality and price.

Such market definition is totally unreasonable where the issue is power to control price or exclude competition, and "* * * without a minimally reasonable definition of markets, criteria based on quantitative shares become whimsy." (Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis,* p. 134.)

D. The Erroneous Percentages Attributed to Defendants

There is still another area of fatal deficiency in the market shares assigned to defendants by the Government and the District Court as the basis for inferring monopoly power from which monopolization was presumed. It was found by the court that defendants' "share of the total national accredited CSPS market ranged from 87% to 91%." (FF 44, R. 756)

These market share data were derived from stipulated figures based upon the testimony of accredited central station witnesses as to the *total* revenue of all "approved central stations" for the nine different categories of services selected by the Government.[158] Some of these central stations, however, were accredited by the insurance rating agencies for only one category or part of one category of services (*e.g.*, only for fire or only for burglary), but their revenues for the services for which they were not accredited were nonetheless included.[159] Moreover, the revenue from services of a character not approved by any insurance underwriter, such as holdup alarm (other than in connection with bank insurance) and industrial process supervisory services, was also included. Therefore, while the market definition urged by the Government and adopted by the court below purports to include only "accredited central station services," it in fact includes revenue from subscribers to central station services *not* approved by the insurance rating agencies and *not* entitled to insurance premium discounts.[160] Indeed, accredited central station witnesses emphasized that much, if not the bulk, of their

158. Watchman's reporting service, manual fire alarm service, burglar alarm service for protection of premises, burglar alarm protection for safes and vaults, holdup alarm service, automatic fire detection and alarm service, sprinkler supervisory service, waterflow alarm service, and the many forms of industrial process supervisory services.

159. *E.g.*, GX 319, R. 2425; GX 330, R. 2708-09; GX 336, p. 6; GX 338, R. 2889-90; GX 342, pp. 23-24; GX 351, pp. 7-8, R. 331-35; GX 312, R. 2266-78, 330-31.

160. The hodge-podge, make-believe character of the market definition urged by the Government and uncritically adopted by the District Court is underscored by other internal inconsistencies. Thus, while concluding that the market is "limited to [insurance] accredited central service protective systems," the court below not only based its only market percentage finding covering all *three* alarm company defendants (who were alleged to have attained their market position pursuant to an overall conspiracy) on total revenue, including that from systems and services not insurance-approved, but also found solely as to ADT and Holmes that part of such revenue, *i.e.*, central station burglar alarm revenue not "certificated" by the underwriters, should in fact be excluded. (FF 44, R. 756)

business is not insurance-approved. Typical was the testimony of an Indianapolis operator:

> "Q. Essentially your business has been and still is predicated on the rendition of protective service of various kinds which is of the unapproved or uncertificated variety? A. That's right, most companies are that way, all over the United States they are that way." (GX 349, R. 3029, 331-32)

To illustrate the inapplicability of the figures to the market as defined, all of ADT's and Holmes' central station burglar alarm revenues and those of other accredited central station concerns are included. But as previously noted (pp. 6-7, *supra*), burglar alarm service from an approved central station does not by itself entitle the subscriber to insurance premium discounts. The subscribers may obtain "certification" entitling them to premium savings only if they elect to comply with the rating agencies' requirements as to the number, placement and types of devices used at their premises and the standards of inspection, testing and maintenance for those devices, as well as other criteria. Only a minority of the subscribers served by an approved central station choose this "certificated" or insurance-approved type of service[161] More specifically, only 39 per cent of ADT's central station burglar alarm systems were approved or "certificated" in 1961. (R. 311) Consequently, defendants' revenue from services not approved for insurance purposes and exactly like the services furnished by central stations not approved or accredited is included in the market revenue universe. But that identical revenue by the unaccredited central stations is arbitrarily and prejudicially excluded. And the revenue figures upon which the Government and the District Court rely are clearly not

161. See the testimony of competing accredited central station witnesses: *e.g.*, GX 320, R. 2460-62; GX 341, pp. 24-25; GX 349, pp. 11-13; GX 336, R. 2859; GX 329, pp. 54-56, R. 2674; GX 339, pp. 15-16, R. 2900; GX 333, R. 2794-95; GX 320, R. 2481-82, 331-35. The Government expressly concedes that "not all central station burglar alarm installations are approved or 'certificated' by the authorities having jurisdiction." (GTB, p. 191)

"limited to accredited central service protective systems." (FF 36, R. 754)

The nature of this total infirmity can be demonstrated by hypothetical figures (since the comparative values are not in the record) in an illustrative table:

	Volume of Business					
	Insurance-Approved CSPS		*Other CSPS*		*Total*	
	Revenue	*%*	*Revenue*	*%*	*Revenue*	*%*
Defendants	80	89	20	10	100	33
Other Accredited CSPS Firms	10	11	15	7	25	8
Non-Accredited CSPS Firms	—	—	175	83	175	59
	90	100	210	100	300	100

Relating these figures to the Government's allegations, adopted without analysis by the court below, defendants were *not* found to have 80/90 of the insurance-approved revenue from all the CSPS services. Rather they were found to have 100/125 of the *total* CSPS revenue (both insurance-approved and other) of accredited CSPS concerns alone. Thus the CSPS revenue (175) of non-accredited CSPS firms was excluded, even though it was identical to the "other CSPS revenue" of defendants and other accredited CSPS firms. If it were included, in this example defendants would have 100/300 of the total universe embodying all like revenues.

The market share figures ascribed to defendants by the Government and the court below fail for other reasons as well. We have previously noted that the Government in effect concedes that natural monopoly areas exist because many cities are unable to sustain more than one viable central station. Whether the Government's view that $125,000 annual service revenue constitutes the break-even point is realistic or not, it is apparent that many of the cities

where ADT operates the sole central station are such natural monopoly areas. It is manifestly inequitable, therefore, to include the revenue from those cities in the figures for both the universe and defendants' share when the sole purpose is to infer assertedly unlawful national monopoly power from the resulting percentages.

It is undisputed that no underwriter grants insurance discounts for industrial process supervisory central station service (*e.g.*, monitoring boiler or refrigeration temperatues and other industrial operating or environmental conditions) and in fact there is, therefore, no insurance-approved form of such service. (GX 340, p. 89, R. 331-35). Nevertheless the Government and the District Court included in the "market" figures all such revenue of defendants and other central station concerns solely on the basis that their stations were accredited by the insurance agencies for some other totally unrelated purpose (fire or burglar protection).[162] And yet, without regard for consistency, logic, or fairness, the Government and court below have excluded the same types of industrial process supervisory service furnished by unaccredited central stations and telephone answering service companies. (GX 312, R. 2266-78, 330-31).

Thus, in conclusion, even if the District Court's erroneous market definition could be sustained, it is clear that the court made fundamental errors, incurable on the record here, in calculating what defendants' share of that market was. The end result of the erroneous share calculations and market definitions, whether considered individually or together, is that the percentages which formed the sole basis for the inference of monopoly power are invalid and cannot be sustained.

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162. *E.g.*, GX 330, R. 2711-12, 331-35; GX 334, R. 2843, 331-35.

II

EVEN IF THE MARKET DEFINITION AND PERCENTAGES ADOPTED BY THE DISTRICT COURT COULD BE SUSTAINED, IT WAS ERROR TO PRESUME MONOPOLY POWER ON THAT BASIS ALONE CONTRARY TO ACCEPTED ECONOMIC STANDARDS AND UPON A RECORD WHICH, MEASURED BY THOSE STANDARDS, FAILS TO ESTABLISH AND IS INCONSISTENT WITH SUCH POWER.

Economists are in general agreement that monopoly power cannot be validly inferred solely from percentage share of a defined market. While they may differ as to the other factors deemed most important in establishing the existence of monopoly, they uniformly reject market share alone. The other factors which receive varying weights in the scale of priority of the different schools of economic thought are generally classified under the overall headings of long-term "performance" and those aspects of industry "structure" other than just mere market share alone.

Professor Mason states this proposition unequivocally: "Market share is an important condition relevant to workable competition, but in the absence of certain tests of performance it cannot be taken as a measure of market control."[163] Mason, "The Current Status of the Monopoly

163. Mason criticizes the decision in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) on such grounds. "Although this decision probably broke new legal ground, it is from an economist's point of view, marred by what is at best some very dubious economics. The share of the market possessed by Alcoa was incorrectly measured [and] the degree of market control was identified with percentage share of the market, * * * Even if Alcoa's share of the market had been correctly measured [at over 90%], it would have been wrong to infer degree of market control directly from this share. If products excluded in defining the market are close substitutes, if the entry of new firms is relatively easy, if the supply of imports is elastic with respect to price changes, even a large percentage share of the market is compatible with a small degree of market control." (*Ibid.* at 1273-74) Elsewhere Mason has stated more broadly the limited implications even of market structure factors in general (including not just market share): "The other main

Problem in the United States," 62 Harv. L. Rev. 1265, 1274 (1949). In "Effective Competition and the Antitrust Laws," 61 Harv. L. Rev. 1289, 1297 (1948), M. A. Adelman declares that "Juggling definitions of monopoly yields no light. If we dislike size and concentration, we ought to proceed directly against these. But they have no obvious or simple relation to objectionable market control."

Discussing "Economic Tests of Monopoly and the Concept of the Relevant Market," 2 Antitrust Bulletin 479, 484-86 (1957), Professor Stocking (initially conceding that "Even for economists, determining the existence of monopoly is difficult.") concludes that market definition pursuant to the cross-elasticity of demand "concept alone cannot be of much use," and that conduct and performance must also be assessed. Further, he expresses the view that "The aspects of performance most relevant to determining whether a firm possesses monopoly power are its pricing policy and its profit record. * * * The characteristics that distinguish monopolistic from competitive markets where both have flexible prices are their cost-price ratios and their rate of earnings * * * Long-term [abnormal, that is, non-competitive] profit rates may be an aid in determining the existence of monopoly."[164]

Another commentator concludes that the reasonable interchangeability or cross-elasticity of demand test established in *Cellophane* incorporates "a consideration of costs, so that [distinctive] substitutes will be excluded [from the relevant market] where the Government shows that at

misconception is that market power or the plane of competition can be inferred directly and exclusively from data relating to the structure of the market. As the phrase is currently used, market structure refers to those permanent, or slowly changing competitive limitations of which a firm must take account in formulating its own policies. The most important of these limitations are the number and size distribution of buyers and sellers in the market, the conditions of entry of new firms, and the extent of product differentiation, including geographical dispersion." Preface to Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis*, p. XVIII.

164. See also Stocking's comments in "The Rule of Reason, Workable Competition and Monopoly," 64 Yale L. J. 1107, 1110-11, 1143 (1955), quoted *supra* at p. 122, n. 151.

prices producing a high cross-elasticity the alleged monopolist has a substantial cost advantage." Turner, "Antitrust Policy and the Cellophane Case," 70 Harv. L. Rev. 281, 302, 309-10 (1956). As to such a test, he then asserts:

> "It is an economically sound way of determining whether substitutes are an effective check on the power of the alleged monopolist. If economic criticism is to be made, it should be directed at the potentially misleading aspects of the traditional two-step legal approach of first defining the market and then deciding whether monopoly power exists. Percentage share of a market based on a particular definition of the market does not in itself indicate the extent of monopoly power.[165] Actually, it seems that the question of the extent of the power will often be answered in the process of deciding what the market is, so that market definition becomes redundant." (*Ibid.* at 309)

This same analyst, in another frequently cited study which he co-authored, sets forth the necessity of examining both performance and structure if any informed conclusion is to be reached on the related subjects of market definition and market power:

> "We can neither predict market performance from market structure, nor can we tell from structure alone how competitive the processes of the market are. A major consequence of the gaps in our knowledge is that our conclusions about the functioning of any concrete market depend on the joint study of both structure and performance. We cannot determine what structure is without examining certain aspects of performance. Our problem then is to trace out the underlying structure both by direct observation and by inference from the

165. "* * * [W]e do not attempt to classify individual markets as competitive or monopolistic. * * * In general, the application to individual markets of any criterion we choose requires a fairly thorough industry study and cannot be done solely on the basis of concentration data or other simple statistical materials." Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis*, p. 25.

behavior of certain performance variables in the known circumstances of the past. * * * [A] careful definition of markets—as *Cellophane* shows in approach if not in result—requires in many cases an examination of much the same economic evidence that is pertinent to a determination of whether or not market power exists, * * *" (Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis*, pp. 60-61, 99)

This same study deals in detail with the fact that even the ingredients of market structure[166] other than mere market share are not alone determinative of market power. All the market structure ingredients must be tested against such "relevant dimensions of performance" as long term price-cost, price-demand, output-capacity, and capacity-demand ratios, technical efficiency and other aspects of performance, and "all these matters can be dealt with on the basis of materials usually found in business records, * * *" (*Ibid.* at 59-70, 112-13)

This same treatise is instructive as to significant considerations even where market share validly determined is so large as to suggest the possibility of monopoly power:

> "In general, it can be said that a large market share, held either by a single firm or by a small number of firms acting jointly, is a necessary condition for the existence of substantial market power in a market. * * * *This necessary condition is not, in general, a sufficient condition.* Also, whether one or several firms are in-

166. "'Market structure' we use to mean those conditions external to the firm which are relatively permanent or which change only slowly, and which affect, if they do not determine, the way the firm operates. * * * The major elements of market structure can be divided into five classes: (1) the breadth of the market and the character of demand, (2) the number and size distribution of sellers and buyers, (3) the conditions of entry for new sellers and expansion of existing sellers, (4) the character and importance of product differentiation, and (5) the degree of independence of action among sellers and buyers. * * * While the information examined under [these classifications] may indicate the absence of market power, it cannot, alone, demonstrate its existence in the usual case." (*Ibid.* at 59, 71, 112-13)

volved, there must be some barriers to entry—either created by the policy of the firms or arising from the technical, institutional and legal environment of the market—which make possible the continued exercise of market power without a drastic loss of market share and profit in the long run. * * * Market share having been determined, the basic problem of moving from an estimate of market share to a judgment on market power arises. * * * In the simplest case, say that of the single large firm with more than 35 percent of the market, with no rivals larger than a tenth its size, the problem turns primarily around the conditions determining the ability of existing rivals to expand and new producers to enter.[167] The undoubted short-run power of the large firm in this situation, when the industry is operating at full capacity, would extend over a substantial period only if its rivals could not expand their outputs at costs at all comparable with its costs, and new firms could not enter at comparable costs. As we have already indicated, judgment on the questions would depend on an examination of both the cost situations, factor supply conditions, and practices of the industry—in short, market structure—and the actual price, profit, investment history of the large firm and the whole industry—in short, the efficiency aspects of market performance. A larger market share of the dominant firm without rivals of substantial size would strengthen the presumption that the firm has large market power, but it would in no way change the kind of questions which would require study before this conclusion would be fully justified." (*Ibid.* at pp. 101, 103-04)

Even if the market definition and percentages erroneously adopted by the District Court could be sustained, its

167. "This is not to say that a firm with 35 percent market share and no significant rivals generally possesses any considerable market power. But this situation might well be used as a presumptive boundary to mark off what warrants further investigation from what does not. To justify the initiation of a trial or other formal procedures, much more would be required." (*Ibid.* at p. 103, n. 5)

reliance upon the asserted market shares as the sole basis for its inference of monopoly power is patently in disregard of and incompatible with these views of leading economists. The court below gave no consideration to the additional factors of industry structure and performance which must be examined before any valid conclusion can be reached as to the existence of monopoly power. Indeed, the Government's evidence fails to bear upon these essential factors and the only portions of the record pertaining at all to any of those factors at the very least strongly suggest the absence of monopoly power.

While the Government alleged that the defendants "threatened and persuaded actual and potential competitors not to enter or to discontinue the business of central station electric protection service" and that "actual and potential competitors of defendants have been excluded and prevented from rendering central station electric protection service" (R. 37-38), the court below rejected these charges out of hand, finding that "there is no persuasive evidence that any particular prospective entrant has been unable to begin operations, or that any specific CSPS firm has failed or been driven out of business." (FF 45, R. 756)

In fact, however, the District Court's findings wholly fail to delineate the undisputed evidence adverse to any contention that defendants have the power to exclude even accredited central station competition, let alone other effectively competing forms of protection. On this issue, one measure of the failure of the Government's case is that defendants' position has not even deterred the regular entry of new accredited central station concerns on an increasingly accelerated basis, the great bulk of them furnishing such services in cities where defendants have long been established. Moreover, those new participants have without exception steadily increased the volume of business they have won, and with marked and continuing expansion in the total volume of business done by accredited central stations they have steadily increased their share of such business at the expense of defendants' relative position.

The number of non-defendant accredited central stations increased more than five-fold between 1945 and 1964, from 8 to at least 43, 24 entering such business since 1957. And of the 35 of those stations established since 1945, 30 have been in cities where defendants had existing central stations. (D75(b), R. 4507-08, 496; W6a, R. 4716-20, 4725-26, 497, 595-96).

These non-defendant concerns which have entered this business since it was pioneered by defendants have steadily increased their volume without a single exception. From 1957 to 1961, their average increase in revenue was 89.8% and in subscribers was 67.5% (against defendants' increases of 30.1% and 13.7%). During this period the revenues of some of these non-defendant companies increased as much as five, eight, nine and even ten times. Robinson, in Philadelphia, where defendants have long-established central stations, started accredited service in 1958 and increased its revenue from $29,000 that year to $200,000 in 1961. In the same city, Sentinel realized $28,000 in its first year, 1960, and increased that sum to $138,000 in 1961. Morse, in Los Angeles where ADT has long operated an accredited central station, started with $178,000 in 1959, its first year, and upped that total to $311,000 by 1961. (GX 312, R. 2274-78, 330-31) In Kansas City, where two new accredited central stations have entered into competition with ADT since 1962, the proprietor of one of them, Alarm Engineering Co., testified:

> "Q. Do you go out and solicit, or do you wait for calls to come in? A. I haven't had to solicit in the last five or six months. I have been too busy answering the telephone, and going out and getting bids.
>
> "Q. Do you have more business coming in than you can actually handle at the present time? A. We are handling it, but we are snowed under." (W6a, R. 4738, 497, 595-96)

The total volume of business by all accredited central station companies has been steadily expanding. Between 1957 and 1961 total revenues increased 35.3%, from $48,392,-

756 to $65,478,970. (GX 312, R. 2268, 330-31) No alarm company witness expressed any view other than that business for accredited central stations is burgeoning. (*E.g.*, GX 342, pp. 10-11; GX 357, R. 4915, 331-35). The president of Potter, operating growing stations in St. Louis and Cincinnati, gave representative testimony, stating that prospects for protective services "are increasing at a very great rate. * * * I don't think we in the protective business have scratched the surface of what we could do." (GX 326, pp. 81, 137, R. 331-2)

And most significantly, of this increasing volume of business the share won by non-defendant accredited central station companies which have entered into competition with defendants[168] has been steadily and dramatically growing in an inflexible trend. The District Court found that defendants' "shares of central station subscribers and of revenue showed a slightly declining trend." (FF 45, R. 756) But that finding fails to state the import of what has been happening. It is based upon figures showing that, in terms of annual totals (which represent primarily subscribers whose relationships were initiated in earlier years, since subscribers generally continue with a protection company for many years, as previously noted),[169] non-defendants' shares of accredited central station subscribers grew from 12.51% to 17.39% in 1961 and their shares of revenue increased from 8.67% to 12.15% during that period. (GX 312, R. 2268, 330-31)

Obviously, on this essentially cumulative counting basis used by the Government and the court below the defendants, as the pioneers of accredited central station services engaged in that business for more than 60 years, would long

168. In 1961, for example, 90% of all non-defendant accredited central station revenue was derived from cities where defendants previously had established accredited central stations (Houston, Albany, Indianapolis, Los Angeles, Minneapolis, Boston, New York, Chicago, Dayton, Denver, Newark, Washington, Pittsburgh, Milwaukee, Detroit, Cleveland, Baltimore, Philadelphia, San Francisco, Cincinnati, St. Louis, Peoria, and Dallas). (GX 312, R. 2274, 330-31; D75(b), R. 4507-08, 496).

169. See pp. 109-14, *supra*.

show top-heavy percentages in comparison with new entries who have only more recently followed their lead as the available business has expanded to sustain more than one station in various cities. But the picture is markedly different when analysis is directed to what is happening in terms of contemporary new business won and lost. The same basic figures permit computation of the relative shares of the new business each year as represented by the incremental increase in annual total accredited central station revenues. Thus, in 1958, total revenue exceeded that in 1957 by $4,222,345 and non-defendants accounted for $765,779 of that amount or 18.1% of this new business. And in the succeeding years non-defendants exceeded that percentage until in 1961, when they won $1,115,660 of the increase of $3,937,327 over 1960 total revenue, they accounted for 28.3% of the new business that year. (GX 312, R. 2268, R. 330-31)

Considering the alleged market as a meaningful, contemporary concept manifesting competition and market power as they in fact are, such penetration by more and more new entrants commanding substantial and steadily growing market shares belies any power to exclude competition and attests to the error of inferring monopoly power solely from the percentages found by the court below. Even lay witnesses from competing alarm companies recognized that defendants' present position is essentially a residual carry-over reflecting their establishment of accredited central station services before others in cities across the nation which have only gradually become able to sustain more than one such station. As a Kansas City competitor testified,

> "You have a company like ADT that has been in Kansas City for 60 or 70 years and they have built up a tremendous volume of business. * * * They give the service. I mean they are a good company service-wise, * * * Primarily it is because they were here first. And I say that, I mean I think that is the reason for their size. That is the reason for their size clear around the country. * * * They were the pioneers." (W40a, R. 5575-76, 497, 595-96)

The Government neither offered evidence nor urged that the monopoly power allegedly held by defendants is demonstrated by cost-price ratios or rate of earnings.[170] Essentially the only record data bearing at all upon this pertinent line of inquiry are earnings figures for ADT which it introduced. Its after-tax profits as a percentage of total revenue for the years 1959 through 1963 were 8.7%, 8.0%, 7.3%, 7.0% and 7.2%. (V-1, R. 3687, 554) For the years 1947 through 1963, ADT's after-tax earnings averaged 3.6% of gross assets (varying steadily, from a low of 2.8% to a high of 4.3%); 5.4% of net assets (varying steadily, from a low of 3.7% to a high of 6.4%); and 10.0% of net worth (also varying steadily, from a low of 7.6% to a high of 12.2% in one year—in only four other of the seventeen years was the figure in excess of 10%.) (W-1, R. 3688, 554)

Two aspects of these figures are significant. First, they represent the results of all of ADT's activities and not just its furnishing of accredited central station services. Consequently, even if they were of a magnitude compatible with monopoly power they are not derived solely from the market found by the court below.[171] They are thus, in both kind and degree, wholly unlike the data (net return as a percentage of fixed and working capital attributable to duPont's cellophane business alone[172]) upon which the dissenters relied in *Cellophane*:

> "[D]uring the period 1937-1947, despite great expansion of sales, duPont's * * * average 'net return'

170. As noted *supra*, p. 137, Stocking considers such information to constitute "the aspects of performance most relevant to determining whether a firm possesses monopoly power. * * *"

171. "For the more typical case of the multi-product firm, average total profits are not a satisfactory measure of price-cost relations, since high price-cost margins on some products might be counterbalanced by low margins on others, making for an average not different from the level of normal profits. It is thus necessary to have some measure of price-cost margins for each product, or for each major product line, and to apply the appropriate tests to each separately." (Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis*, p. 64)

172. See Gov't.'s Brief before this Court, pp. 17-18.

(after deduction of taxes, bonuses, and fundamental research expenditures) was 15.9%. Such profits provide a powerful incentive for the entry of competitors. Yet from 1924 to 1951 only one new firm, Sylvania, was able to begin cellophane production [and it] could not have entered if La Cellophane's secret process had not been stolen." (351 U. S. at 420-21)

Second, even if ADT's profit data were confined to the asserted market found below, to have significance those figures would require comparison with the experience of others for "* * * even evidence of [consistently] high profits is potentially ambiguous. It at least requires a comparison with the profits of alleged competitors, as both courts in *Cellophane* held."[173] Turner, "Antitrust Policy and the Cellophane Case," 70 Harv. L. Rev. 281, 311-12 (1956).[174] The Government and court below eschewed reliance upon any such comparisons. There is here no proof that defendants' profits or rate of return on investment in the accredited central station segment of their businesses have been greater than those of other alarm companies, whether accredited central stations or others. And as Turner concludes, "[O]nce the defense puts in its evidence of substitutability, the [Supreme Court in *Cellophane*] clearly puts on the Government the burden of introducing comparative cost-and-profit data sufficient to establish the power to exclude competition when it is desired to do so." (*Ibid* at 303)

We have previously noted (pp. 121-30) the substantial evidence of the marked price interrelationship and sensi-

173. See also *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 404 (1956).

174. See also Stocking, "The Rule of Reason, Workable Competition and Monopoly." 64 Yale L. Journ. 1107, 1145-46 (1955). ("* * * [M]any factors besides the intensity of competition affect earnings, and a sustained high rate of earnings in a particular product does not prove that earnings are monopolistic. Cellophane has met a rapidly expanding demand, as have other wrapping materials. Unfortunately data are not available for comparing cellophane's earning rates with those of rival materials.")

tivity between accredited central station services and other forms of protection. The record is also replete with evidence of defendants' necessary price responsiveness to the services of other accredited central station concerns. The Government introduced literally hundreds of ADT competitive reports and other contemporaneous business records demonstrating the reduction of ADT's target rates compelled by competitors' quotations for accredited CSPS to specific prospects. Only a small proportion of the total has been excerpted in the printed transcript of record. (R. 1629-1961) On a broader basis, from 1957 through 1963, ADT was required to lower its target prices in at least 35 to 45% of its solicitations in cities with non-defendant accredited central stations. (F-79, R. 3569-89, 42) Further, as already noted in connection with competition other than from accredited central stations, the evidence shows continuing concern by ADT sales personnel lest it price itself out of effective competition with other accredited central stations. (GX 96, R. 1487-1501, 327; GX 167-GX 174, R. 1602-1627, 327; R. 613)

The record here fails to evidence power over price, as would be the expected corollary to the evidence on new entries and their growth in an expanding business, for as noted in *Cellophane,* "Price and competition are so intimately entwined that any discussion of theory must treat them as one. It is inconceivable that price could be controlled without power over competition or vice versa." (351 U. S. at 392) Here we have no showing of the requisite power over price or competition evidenced by cost advantages, absence of new entries over a long period of highly profitable operations, actual exclusion, or any other of the indicia of industry structure and performance essential (whether considered singly or in combination) to sustain any conclusion of monopoly power even where dominant market occupation is predicated upon valid market definition and percentages.

III

THE DISTRICT COURT DENIED DEFENDANTS DUE PROCESS OF LAW IN CREATING A CRIMINAL PRESUMPTION OF GUILT, SHIFTING TO THEM THE BURDEN OF PROVING THEY HAD NOT VIOLATED THE PROVISIONS OF SECTIONS 1 AND 2 OF THE SHERMAN ACT, BASED UPON A FINDING OF MONOPOLY POWER INFERRED SOLELY FROM ITS ERRONEOUS MARKET DEFINITION AND PERCENTAGES.

Until the decision below, even in antitrust cases the plaintiff has had the burden of proof. Actions under Section 2 of the Sherman Act have been no exception: "The burden of proof, of course, was upon the Government to establish monopoly." *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377, 381 (1956). The criminal offense of monopolization has required proof of monopoly power—the power to control prices or to exclude competitors in the "part of commerce" allegedly monopolized.[175] But even upon such proof, a finding of violation has required further that the plaintiff carry the burden of proving additional facts.

Thus, monopoly power has been deemed illegal (*i.e.*, prohibited "monopolization") only when, for example, such power (1) was acquired, maintained or expanded by restraints of trade in violation of Section 1 or (2) was obtained, sustained or exercised by acts of such effect as to connote exclusionary purpose ("the element of deliberateness") even though those acts might be "honestly industrial" and not in and of themselves illegal restraints of trade.[176]

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175. *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377 (1956); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954).

176. *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *United States* v. *Griffith*, 334 U. S. 100 (1948); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295

In sum, because monopoly power can be "thrust upon" a defendant,[177] the cases have recognized that a plaintiff must sustain not only the burden of proving monopoly but also the burden of proving monopolization. The District Court in *Cellophane* expressly so held:

> "Plaintiff has not by its attack been able to uncover any conduct to demonstrate duPont's position has been either acquired or maintained by predatory acts. Plaintiff has burden of proof in this regard, and it has failed to sustain that burden." *United States* v. *E. I. duPont deNemours & Co.*, 118 F. Supp. 41, 223 (D. Del. 1953), *aff'd on other grounds*, 351 U. S. 377 (1956).

And Judge Learned Hand, in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 425, 429, 434 (2d Cir. 1945), holding that "It does not follow because 'Alcoa' had such a monopoly, that it had 'monopolized'" because monopoly

(D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954); *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946). In *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377, 390 (1956), this Court noted that, "Senator Hoar, in discussing §2, pointed out that monopoly involved something more than extraordinary commercial success, 'that it involved something like the use of means which made it impossible for other persons to engage in fair competition.'" Elsewhere these principles have been alluded to as follows: "Monopolizing under Section 2 consists of monopoly in the economic sense—that is, power to fix prices or to exclude competition—plus a carefully limited ingredient of purpose to use or preserve such power. Economic monopoly becomes illegal monopolization not only (1) if it was achieved or preserved by conduct violating Section 1 but also (2) if it was, even by restrictions not prohibited by Section 1, deliberately obtained or maintained. This element of 'deliberateness' or 'purpose', distinguishing economic monopoly from the offense of monopolization, differs from the more demanding concept of specific intent' relevant where the offense is an attempt to monopolize." Report, Att'y Gen. Nat. Com. to Study the Antitrust Laws, 43 (1955).

177. Monopoly power attained even other than by an unwitting monopolist can be lawful and something less than the monopolization proscribed by Section 2. Thus, in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945), Judge Hand recognized that "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry."

can be "lawful or unlawful, as the case might be," said that the Government had the burden of proof "upon all the issues." See also *Clark Marine Corp.* v. *Cargill, Inc.*, 226 F. Supp. 103 (E. D. La. 1964), *aff'd*, 345 F. 2d 79 (5th Cir. 1965); *cert. denied*, —— U. S. ——, 34 U. S. Law Week 3256 (1/25/66); *United Banana Co., Inc.* v. *United Fruit Co.*, 245 F. Supp. 161 (D. Conn. 1965).

Here, however, after trial and without prior warning, the District Court expressly shifted this burden from the Government to the defendants,[178] stating in its decision:

> "* * * [M]ost of the cognoscenti have expected that a day would come when the Supreme Court would announce that where one or more persons acting jointly had acquired so clear a dominance in a market as to have the power to exclude competition therefrom, there was a *rebuttable presumption that such power had been criminally acquired* and was a monopolizing punishable under §2." (R. 745)

Thus assuming that this Court would change the existing law on an issue so fundamental not only to antitrust law but, indeed, to the broader concepts of due process of law, the court below continued:

> "* * * To this Court it appears that the day has come for it, and more important for counsel, to proceed on the acknowledged principle that once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable pre-

178. The Government never urged any such unprecedented approach. Indeed, the Government has elsewhere acknowledged that a plaintiff in a monopolization case must carry the full burden of proof outlined above. Thus, the *amicus* brief filed by the Government in a case before this Court this Term (*Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, —— U. S. ——, 34 Law Week 4037 (12/7/65)) states: "The offense of monopolization under Section 2 of the Sherman Act is established by proof (1) that the defendant possessed the power to exclude competitors from the relevant market and (2) that the power was deliberately obtained or maintained." (p. 12)

sumptions that defendant has monopoly power and *has monopolized in violation of §2.*" (R. 746)

The District Court, however, went even further, making clear not only that it was in fact shifting the burden of proof but also that the burden thus shifted was to disprove antitrust offenses other than just monopolization in violation of the criminal provisions of Section 2 of the Sherman Act:

> "*Such a shifting of the burden not merely of going forward, but of proof,* such a rebuttable presumption rests on the by-now dozens of court records which make it quite clear that it is the highly exceptional case, a *rara avis* more often found in academic groves than in the thickets of business, where monopoly power was thrust upon an enterprise by the economic character of the industry and by what Judge L. Hand in *Aluminum* called 'superior skill, foresight and industry.' More than 7 decades of Sherman Act enforcement leave the informed observer with the abiding conviction that durable non-statutory *monopolies* (ones created without patents or licenses or lasting beyond their term) *are, to a moral certainty, due to acquisitions of competitors or restraints of trade prohibited by §1.*" (R. 745-46)

Proceeding still further, the court below concluded that a mere finding of monopoly power, inferred from dominant market share alone, would also shift to defendants the burden of proving that they had not attempted to monopolize in violation of Section 2:

> "Defendants, faced with proof of overwhelming share of the accredited CSPS business in the hands of the alarm company defendants, have offered no evidence to rebut the *presumption that this share was the result of an attempt to monopolize.*" (FF 48, R. 757)

The court below thus expressly conceded it was "shifting the burden of proof" and creating "*rebuttable* pre-

sumptions". In fact, however, the trial judge's stated conviction that monopoly power is *"to a moral certainty,* due to acquisitions of competitors or restraints of trade prohibited by §1" wholly belies the implication that defendants, once found to have monopoly power, could in any circumstances have persuaded the court below that they were innocent of criminal conduct. Moreover, the burden shifted was, in practical terms, impossible for any company to carry, for Judge Wyanski's post-trial demand was that a supposed monopolist maintain the burden of showing that his percentage of the market was "attributable *exclusively* to his skill, efficiency, foresight, or like affirmatively laudable business conduct." (OL 3, R. 762) Thus the District Court was prepared to go even beyond shifting the burden of proof, establishing instead a presumption irrebuttable as a practical matter. The court simply fashioned a new *per se* category of multiple antitrust violations[179]—criminal violations inevitably to be found upon a showing of nothing more than "the relevant market and how predominant a share of that market defendant has."[180]

179. There was no dissembling by Judge Wyzanski as to the *per se* approach he applied here. Apart from the statements in his opinion, during the trial he expressed the far-reaching scope of his views as to antitrust enforcement with such unqualified declarations as, the "* * * rule of reason is a thing of purely historical interest." (R. 371) Compare the statements of this Court in *Cellophane*: "This Court has not receded from its position on the Rule [of Reason] * * * Section 2 requires the application of a reasonable approach in determining the existence of monopoly power just as surely as did §1." 351 U. S. at 387, 393. Similarly, in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, —— U. S. ——, 34 U. S. Law Week 4037 (12/7/65), this Court announced this Term that where "the trial court has not analyzed any economic data" the *per se* concept would not be extended to apply "on the bare pleadings and absent examination of market effect and economic consequences."

180. An academic commentary strongly supporting the District Court's new rule and its *de facto* creation of a new substantive offense of monopoly alone contains this realistic observation: "Although Judge Wyzanski speaks of a rebuttable presumption rather than one which is virtually irrebuttable, the basis of the proposed rule is his 'conviction that durable nonstatutory monopolies * * * are, *to a moral certainty,* due to acquisitions of competitors or restraints of trade prohibited by §1.' Given this assumption, it follows that any attempt to

Even if the trial judge's mind had not thus been irrevocably set as to the universal illegality of monopoly power and if the presumptions he erected were in fact truly rebuttable, the revolution in both substantive and evidentiary law wrought by the District Court is manifest. Here, after trial, the defendants have been told for the first time that they had the burden, in a case involving facts dating back as much as 60 years, of "proving a negative" as to not one but several alleged violations of criminal statutes. In addition to unlawful monopolization, the court below has concluded as a matter of law—upon the basis of its newly fashioned presumptions—that the alarm company defendants unlawfully attempted to monopolize, have conspired to monopolize, and have engaged in violations of Sherman Section 1.

The impact of this unprecedented judicial topsy-turvy is highlighted by the total failure of the lower court to make any findings of fact concerning agreements or acts in combination—other than as to agreements between some but not all of the defendants dating back to 1907 and earlier (agreements found to have lapsed and to be no longer legally effective[181])—to support its conclusions of law that defendants "resorted to restraints of trade prohibited by Section 1 of the Sherman Act." (FF 48-55, R. 757-60; CL 1-6, R. 760-61) Even the Government recognizes that in the final analysis the court below found violations of the Sherman Act by defendants solely on the basis of the erroneous market definition and percentages. Thus the Government argues that ADT engaged in "predatory practices" but that "the District Court did not find it necessary, under its theory, to make findings with respect to all of ADT's conduct, * * *" (GJS, p. 13)

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justify unreasonable market power will almost inevitably fail, and the presumption raised by the rule becomes virtually irrebuttable. Hence, the proposed test becomes, in effect, a *per se* rule for Section 2." Note, "Section 2 of the Sherman Act—Is a Per Se Test Feasible?" 50 Iowa L. Rev., 1196, 1210 (1965) (Emphasis in original).

181. FF 51a, R. 758.

Although the existence of monopoly power, by itself, has never been sufficient to constitute a violation of any statute, the lower court has here created a presumption that such power inevitably is "*criminally acquired*"—a presumption not of one offense but of several proscribed by more than one statute and invoked upon the basis of a mere showing of "the relevant market and how predominant a share of that market defendant has." The law has been clear that monopoly power, even apart from regulated public utilities, can exist without unlawful origin, maintenance or use.[182] The fact that one has monopoly power does not prove that he has monopolized. To establish a criminal presumption to the contrary, as the court below did, is without basis.[183] *Cf. United States* v. *Gainey*, 380

182. Even Judge Wyzanski heretofore has recognized that monopoly resulting from normal competitive causes and where the monopolist has not employed exclusionary tactics is lawful. Thus in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 344-45 (D. Mass. 1953), he distinguished between monopoly born "of ability, natural forces, or law, * * * the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive society must foster," as opposed to monopoly created, maintained or exercised by acts which raise "unnatural barriers; * * * unnecessarily exclude actual and potential competition; [and] restrict a free market."

183. In concluding that "it is the highly exceptional case * * * where monopoly power was thrust upon an enterprise" and that monopolies "are, to a moral certainty, due to acquisitions of competitors or restraints of trade prohibited by §1," the court below relied upon "more than 7 decades of Sherman Act enforcement" and the "by-now dozens of court records which make it quite clear that it is the highly exceptional case * * * where monopoly power was thrust upon an enterprise * * *" (R. 745-46) We submit that these sources are wholly incompetent to establish the requisite reasonable relationship between the presumption of monopolization and other criminal violations of the Sherman Act and the facts upon which it is based, *i.e.*, mere definition of the market and dominant percentage thereof, even if monopoly power could appropriately be inferred therefrom. Clearly this Court would not sustain a presumption of guilt arising from the fact of arrest on felony charges even though, paraphrasing the District Court's language, "the by-now thousands of court records of convictions of persons charged with felonies make it quite clear that it is the highly exceptional case, a *rara avis*, where an innocent party is arrested." (See Grinnell Brief, pp. 105-08)

U. S. 63 (1965); *Tot* v. *United States*, 319 U. S. 463 (1943); *Morrison* v. *California*, 291 U. S. 82 (1934).

Even if monopoly power exists, that fact alone determines no ultimate issue. Sections 1 and 2 of the Sherman Act are both criminal and civil in character.[184] Clearly a criminal statute must be concerned with acts or conduct, not status alone. How or why monopoly power came to exist is the crucial element in the crime of monopolization. The Government has and should have the burden of proving that monopoly power was achieved, used or maintained in a manner prohibited by the statute. As a matter of fundamental jurisprudence, behavior—not solely economic structure or status—is an essential element to the definition of any crime.[185] Here the District Court has in reality eliminated behavior from the definition of the crime of monopolization. The court has held that to prevail the

184. "It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 401 (1904) (dissenting opinion by Justice Holmes). Again, it has been observed that "The Sherman Act is a criminal statute, and it is to be expected that it should ban some kind of conduct which conceivably the offender could have eschewed. It is hardly in the spirit of our legal tradition to apply criminal sanctions to someone because of a situation in which he finds himself willy-nilly." Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis*, p. 91. *Cf., United States* v. *Proctor & Gamble Co.*, 187 F. Supp. 55, 58 (D. N. J. 1960) ("* * * equity has no general jurisdiction over cases brought for violation of the Sherman Act, but only has jurisdiction based on a criminal violation of the Act in order to prevent the recurrence of such a violation in the future."); *United States* v. *Swift*, 188 Fed. 92, 96 (N. D. Ill. 1911) ("The Sherman Act is primarily a criminal statute * * * [I]f injunctions heretofore have been upheld by the Supreme Court, the Supreme Court in upholding them necessarily has determined that the things which were enjoined were crimes, * * *")

185. In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429-30 (2d Cir. 1945), Judge Hand, after listing a variety of instances in which monopoly power would be lawful, said "Since the Act makes 'monopolizing' a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress to include such instances."

Government must prove only that an alleged monopolist has a "predominant share" of the relevant market and unless the defendant can carry the essentially impossible burden of proving that his share of the market is "attributable *exclusively* to his skill, efficiency, foresight, or like affirmatively laudable business conduct," then he "stands condemned."[186] (OL 3, R. 762)

If this Court approves the approach taken below in thus reaching the determination that the defendants here have monopolized, then hereafter the mere status of monopoly

186. Judge Wyzanski expressly declared that "The Government need not prove, and in a well-conducted trial ought not to be allowed to consume time in needlessly proving defendant's predatory tactics, if any, or defendant's pricing, or production, or selling, or leasing, or marketing, or financial policies while in this predominant role." (R. 746) Mere statement of the questions patently prompted by placing upon defendants the burden of proving that their market position is "exclusively," or even primarily, attributable to "affirmatively laudable business conduct" demonstrates the impossibility, in any realistic appraisal, of carrying such a burden. Are firms engaged in business for more than 60 years to be compelled to introduce evidence of the details and ramifications of every single transaction, sale, purchase, lease, or loan to which they have ever been parties? Are they to reconstruct every decision made by management and directors, together with all the considerations prompting it, from the inception of their businesses? If not, applying the standards of the court below, how can they establish that all or any part of their market position is attributable *without exception* to such affirmatively laudable business conduct and that no part of their position is attributable to conduct akin to that which has always been a prerequisite to violation of the monopolization provisions of Section 2? If this is the burden to be foisted upon defendants, in view of the shortness of life if not retention of ancient records, from where is the evidence to come? Clearly the euphemistic "burden of proof" imposed by Judge Wyzanski would be an irrebuttable presumption and in fact a substantive gloss upon Section 2 converting it, without benefit of legislation by Congress, into a wholly new statute making the mere fact of monopoly alone a *per se* crime. Other courts appear to have recognized this fact in placing the burden of proof upon the plaintiff in all respects. ("* * * [A]s upon all the issues, the plaintiff had the burden and must lose unless it succeeded in doing more than leaving the proof in balance * * * [I]t would be a condition that one should show what part of the past earnings were extortionate for not all that even a monopolist may earn is caput lupinum. The plaintiff made no such attempt, * * *" *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 426, 434 (2d Cir. 1945))

power, without more, is—solely as a matter of pure, legal rationalization merely "presumptively," but as a matter of cold practicality really irrebuttably—a crime even though wholly in the absence of any proof of conduct or intent. Such a result, we respectfully submit, was not the intent of Congress, which has granted to the courts and administrative agencies the power to deal only with business conduct or behavior, not the form or structure of our industrial organization. If sound public policy should ever be deemed to require the *per se* outlawing of mere share of the market,[187] then that decision should be made by Congress.

Moreover, if any truly rebuttable presumption arising from market share alone were ever deemed administratively essential to enforcement of the antitrust laws, patently any such presumption should—as a matter of law, economics and sound public policy—be applied only where predicated upon accurate percentages of a market validly defined. Here the post-trial fashioning of a wholly new presumption applied upon the basis of a market definition and percentages which totally disregard the significant impact of substitute or differentiated competing products or services compounds the deprivation of fundamental principles of justice to which defendants were exposed below.

IV

FINDINGS OF FACT AND ULTIMATE CONCLUSIONS BASED THEREON WERE CLEARLY ERRONEOUS AND REQUIRE REVERSAL.

The decision of the District Court is fatally undermined by numerous other findings of fact and conclusions which are clearly erroneous.

The complaint charges an overall conspiracy to restrain trade and to monopolize based upon an alleged agreement,

187. Not only has this Court become increasingly slow to fashion *per se* rules as substantive glosses upon the generalities of the antitrust laws (*cf., White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963), where the Court refused to outlaw vertical territorial limitations without a trial to ascertain "the actual impact of these arrangements on competition"), but it has never approved a *per se* rule as applicable to mere status or position as opposed to specific conduct or behavior.

inter alia, to divide types and areas of service, to acquire accredited CSPS firms and to engage in predatory pricing to destroy competition. (R. 37-38) The District Court concluded that ADT, AFA and Holmes engaged in such restraints of trade in violation of Section 1 of the Sherman Act and that they were a means by which these companies conspired to, and did, monopolize in violation of Section 2 of the Act. (CL 1-6, R. 760-61)

The record does not support any such conclusion of overall conspiracy, and the court below made no supporting findings of fact to that effect. There is no evidence that any of the defendants' acquisitions or allegedly predatory pricing were other than purely unilateral and independent of the others. Even as to the agreements, dating back to 1907 and earlier, allegedly allocating geographic markets and classes of customers, not all of the defendants were parties to any one of those agreements (e.g., one involved ADT and Holmes, the other ADT and AFA), and the agreements were not shown to be in contemplation of each other or part of any unitary "grand design". (FF 51-53, R. 758-59)

Moreover, there is neither evidentiary nor logical support for the lower court's conclusion that ADT's admitted operation for a period of time of 20 deficit stations in cities where there was no other central station "conclusively proves that defendants enjoy national monopolistic power which permits one of the conspirators to occupy local markets where no independent CSPS station would long function and to extend to each of them the combination's national monopolistic control." (FF 47, R. 756-57) To the contrary, the fact of deficit operation in such cities tends only to confirm the fact of substantial cross-elasticity of demand or interchangeability with other protective systems, underscoring the error of the Government and the District Court in artificially limiting their definition of the relevant market. Further, it is of course obvious that a concern operating in many cities with only a minor and clearly non-monopoly percentage of total revenue there or nationally might support deficit operations in some cities, even for a substantial period of time. And significantly,

the court drew this erroneous conclusion as to cities where it found that the available subscriber base was insufficient to support an "independent CSPS station" (FF 47, R. 756-57), so that by definition there could have been no predatory conduct aimed at such competition.[188]

Again, to the extent that the court's finding 55 (R. 760) and the conclusion it purports to support (CL 4, R. 76) imply that ADT or any other defendant has regularly departed from its established prices with predatory intent to forestall accredited central station competition, the record will not sustain any such conclusion. Indeed, the finding's labelling of such deviations as "occasional," "infrequent," "rare" and "at least once" demonstrate in part the character of the evidence when considered against ADT's more than 69,000 subscribers in 1961. (GX 312, R. 2268, 331-32) Omitted, however, are such considerations as the fact that ADT's reiterated policy was one of never beating, but at most only meeting, competitive offerings. (*E.g.*, R. 401-03, 454-55, 471-72, 613-14, 623)

Also without factual or logical support is the finding that when ADT dismantled an acquired central station in 1955, following failure of the Department of Justice to object when clearance was sought, it revealed "in the most flagrant way its intent to attempt to monopolize". (FF 49, R. 757) The unchallenged evidence was that the station in question was in substantial disrepair and deterioration. (R. 534-40) But even more importantly, in a business where the Government concedes the necessity of minimum bases of subscriber revenue to sustain a central station, the fact that upon acquiring another station its subscriber circuits are added to an existing station falls far short of manifesting intent to monopolize. In fact, Government witnesses from competing central station concerns testified

188. Indeed, such deficit operation is consistent with the commencement of central station service. Witnesses for other CSPS firms testified that, even in the absence of accredited central station competition, they did not break even on such services for 20, 7 and 12 years, respectively, after starting them in Tulsa, Honolulu and Phoenix. (GX 359, R. 3166-68; GX 361, R. 3197; GX 363, R. 3241, 331-33)

that typically when one CSPS company acquires another "they would just move the central station over to their office and that is it." (GX 324, p. 35, R. 331-32) Indeed, even the Government conceded that the dismantled facilities "were not required by ADT in carrying on its business." (GTB, p. 35)

As final examples of the numerous clearly erroneous findings, ADT points to those in which the District Court found that the asserted position of ADT and the other defendants in the defined relevant market resulted from restraints of trade (including price deviations by a "monopolistic combination") and acquisitions manifesting alleged attempts to monopolize, a conspiracy to monopolize and achieved monopolization. (FF 48-55, R. 759-60; CL 1-6, R. 760-61) Even if the relevant market designated and defendants' percentages thereof were not erroneous, and even if the court below had in fact relied upon findings as to asserted restraints of trade and acquisitions (as we believe the court's decision, with its express statements as to the presumptions upon which the court relied, demonstrates it did not) rather than placing the burden upon defendants to prove they had not monopolized, there is no showing of the requisite causal connection between the challenged acts and the asserted position of defendants.

To illustrate, the District Court's own findings by implication reflect the record fact that only two of ADT's 22 acquisitions dating back to the early 1900's were within the market as defined by the Government and the court (*cf.* FF 48-50, R. 757-58). And the more recent of those two acquisitions, General Alarm in 1955, was submitted in advance to the Department of Justice, which advised that it did not intend to take action. (U1, R. 3686, 552) Finally, the lapsed agreements challenged as allocating areas and customers among the alarm company defendants are in no way shown to have affected third parties or their competition with the defendants and there is no other basis for concluding that such agreements were the foundation of defendants' alleged monopoly power.

V

DEFENDANTS WERE DENIED A FAIR TRIAL.

The erroneous positions taken by the District Court in connection with the substantive aspects of this case (from the total rejection of the governing market definition standards, through the utter disregard of argument and evidence directed both to those standards and others highly pertinent to any determination of monopoly power, down to the post-trial creation of essentially irrebuttable presumptions—based upon alleged market share alone—that defendants were guilty of violations of criminal antitrust statutes) are explained in substantial part by the overall conduct of the proceedings below. As Grinnell's brief sets forth in detail, those proceedings demonstrate prejudgment and denial of the fair trial essential to due process. Rather than reiterate the arguments in support of that conclusion, we respectfully direct the attention of this Court to the Grinnell brief and ask for review of the questions raised there in the event the Court is not convinced that the complaint should be dismissed for failure of proof, as argued heretofore.

VI

EVEN IF THE DISTRICT COURT'S CONCLUSIONS ON LIABILITY COULD BE SUSTAINED, THE PROVISIONS OF ITS DECREE ENJOINING DEFENDANTS IN BROAD AND AMBIGUOUS STATUTORY LANGUAGE AND PROHIBITING THEIR EMPLOYMENT OF A NON-DEFENDANT INDIVIDUAL MUST FALL.

The District Court entered a decree which merely repeats language of Sections 1 and 2 of the Sherman Act: defendants are "enjoined from further restraining trade, or attempting or combining to restrain trade, in that designated market and from further attempting to monopolize, or conspiring to monopolize, or monopolizing that designated market" (R. 768).

The principles behind the prohibition of such sweeping injunctions have long been made clear by this Court.[189] In *Swift & Company* v. *United States*, 196 U. S. 375 (1905), Justice Holmes stated:

> "* * * we equally are bound *by the first principles of justice* not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. *We cannot issue a general injunction against all possible breaches of the law.*" (196 U. S. at 396)

In ordering the general words "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid," to be stricken from the injunction he stated:

> "The defendants ought to be informed as accurately as the case permits what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid." (*Ibid*, at 401)

More recently, in *Schine Chain Theatres, Inc.* v. *United States*, 334 U. S. 110 (1948), this Court struck down a decree which enjoined defendants from "monopolizing" first and second-run films, stating:

> "* * * The statutory requirement is that these injunctions 'shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained' * * * [W]e think the public interest requires that a more specific decree be entered on this phase of the case. The precise practices found to have

189. Rule 65(d) of the Federal Rules of Civil Procedure requires that every injunction entered by a District Court "shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; * * *"

violated the act should be specifically enjoined."[190] (334 U. S. at 125-126)

These principles set down by this Court and Rule 65(d) are applicable to this case. It is in the public interest that the District Court's patent disregard of such basic and long-standing rules be corrected. This error of the court below is compounded by the fact that the court's failure to rule upon evidentiary objections and to make adequate findings as to what agreements or acts (other than the alarm company agreements of 1907 and earlier), if any, were deemed unlawful leaves defendants without knowledge as to what the decree proscribes (for a description of the various agreements challenged and some of the problems raised by the District Court's vague, omnibus prohibition against "further restraining trade," see Grinnell's brief, pp. 10-12, 83-85).

The decree also provides that none of the defendants "shall, after April 1, 1966, continue to employ or employ, James Douglas Fleming as officer, director, employee, consultant, agent or otherwise." (769) Mr. Fleming, who is the president of Grinnell and chairman of the board of directors of defendant, ADT, was not himself a defendant in this action.

It is clear beyond doubt that a proper injunction restraining corporate defendants from specific violations of the antitrust law is sufficient to bind the present and future officers, agents and employees of those defendants. *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 428 (1945). It can not be presumed that Mr. Fleming would disregard the final decree of the District Court any more than such a presumption would be proper in regard to any defendant in any case. Nor can it be forgotten that the District Court has full power to act in the event Mr. Fleming were to transgress the terms of the order. Thus, even if it were assumed that Mr. Fleming should attempt to frustrate the orders of the District Court, the public in-

190. See also *NLRB* v. *Express Publishing Co.,* 312 U. S. 426, 435-36 (1941).

terest would be protected by swift and effective contempt proceedings.

The wholly punitive and unjustified character of this prohibition is underlined by the fact that the court did not find that Mr. Fleming had committed any personal wrong or had sought any personal gain (the record is barren of any evidence of wrongdoing by Mr. Fleming). Indeed, Judge Wyzanski specifically stated that the decree should "not be regarded as directed against Mr. Fleming, but against defendants' use of Mr. Fleming." (OR 6, R. 766-77) In light of this ingenuous statement, it is clear that if a decree were to be entered at all one directed solely against the corporate defendants would have been sufficient to protect the pubilc interest.

VII

THERE IS NO BASIS FOR PENALIZING DEFENDANTS BY IMPOSING ADDITIONAL RELIEF UPON THEM.

By stipulation, we have agreed to state in this brief our position with respect to our present understanding of the Government's appeal from the final decree entered below. In its Jurisdictional Statement, the Government outlined various aspects in which it considers the relief granted below as to ADT inadequate. They are refusal of the District Court to require divestiture by ADT, enjoin the alarm company defendants from entering into "long-term preemptive arrangements" with their customers, require defendants to sell equipment which they manufacture to competing companies and grant visitation rights. If the judgment of the court below is upheld (which, we urge, it cannot be), and if the relief ordered below is not held to be punitive (which, we urge, it is), then no additional or different relief is necessary. Furthermore, the relief sought by the Government cannot properly be predicated upon the District Court's findings.

A. The Scope of Review

Pursuant to settled principles as to the scope of review, modification of an antitrust decree will be ordered only where the decree is inconsistent with existing law, is based on erroneous findings of fact or conclusions of law, or is inappropriate for the purposes of restoring competition in the industry.[191] The Government here does not attack the findings or claim errors of law, but challenges only the appropriateness of the relief.

This Court has repeatedly stated that the appropriateness of the decree rests in large measure with the discretion of the District Court. Thus in *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 89 (1950), Justice Reed stated:

> "The determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court. Its opportunity to know the record and to appraise the need for prohibitions or affirmative actions normally exceeds that of any reviewing court. This has been repeatedly recognized by us."[192]

Moreover, decrees formulated in the District Court will be upheld unless there is a showing of abuse of discretion and that the relief ordered is inadequate and inappropriate. In sustaining the judgment in *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 156 (1951), the standards for upholding the trial court's decree were stated:

> *"The decree is reasonably consistent with the requirements of the case and remains within the control of the court below."* (Emphasis in original).

Similarly, in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 634 (1953), the Court said that before it would order reversal of a decree "the Government must demonstrate

191. See Note, "Modification of Litigated Antitrust Decrees by the Supreme Court," 56 Col. L. Rev. 420, 425 (1956).

192. To the same effect, see *Associated Press* v. *United States*, 326 U. S. 1, 22 (1945); *Maryland and Virginia Milk Producers' Association, Inc.* v. *United States*, 362 U. S. 458, 473 (1960).

that there was no reasonable basis for the District Judge's decision."

The reasons for this Court's unwillingness to interfere with the trial court's formulation of decrees are preeminently sound and dictated by practicalities:

> "The reasons which thus ordinarily restrict the scope of the appellate review have magnified force in antitrust proceedings. Their complex character usually requires, as in this case, months or years for the trial court's consideration. With its maximum attention, this Court cannot possibly attain the same detailed familiarity with the cause. Nor can it frame at long distance, with the same assurance, a decree adequate for the necessity." (Justice Rutledge, dissenting, in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 441 (1945), *clarified,* 324 U. S. 570 (1945).)
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> "We do not sit to draft antitrust decrees de novo. This is a court of appeal, not a trial court. We do not see the witnesses, sift the evidence in detail, or appraise the course of extended argument, session after session, day after day. (A review of Part III of this opinion abundantly shows the extent to which the District Court's appraisal of the credibility of witnesses, analysis of expert testimony, and reconciliation of the claims of counsel entered into the painstaking process that led to the court's views on complicated issues and ultimately to the formulation of its decree). In short, this Court does not partake of the procedure and is not charged with the responsibility demanded of the court entrusted with the task of devising the details of a decree appropriate for the governance of a vastly complicated situation arising out of unique circumstances. By its nature, this Court, as an appellate tribunal, lacks the means—the procedural facilities—to evolve a decree in a case like this." (Justice Frankfurter, dissenting, in *United States,* v. *E. I. du Pont de Nemours & Co.,* 366 U. S. 316, 371 (1961).)

No cases, including *Gypsum*, have laid down contrary principles. There it was held merely that the decree could be reversed for something less than *gross* abuse of discretion and that this Court will intervene solely when the provisions of the decree are "inappropriate". (340 U. S. at 89). There has been consistent adherence to the principle that the lower court has broad discretion in determining appropriate relief and that its conclusions will not be overturned except upon a showing that such discretion was abused. This principle is particularly *apropos* where, as here, the relief fashioned by the trial court is fully effective to dissipate the impact of any wrong found.

B. The Decree Below

Examination of the decree (R. 768-69) in context with the findings and opinions of the District Court reveals the fashioning of relief appropriate to the violations as seen by both the court *and the Government*—a decree entirely adequate to remedy those violations. That decree was clearly not framed by a court influenced by sympathy for defendants or unaware of the demands of the Sherman Act.[193]

The trial judge followed Justice Holmes' admonition to "Strike for the jugular." While the decree is not long and complicated, it effectively provides relief from those antitrust violations which the court below found to be at the heart of defendants' alleged monopoly position—re-

193. In such a context, Justice Frankfurter remarked: "Discretion means a choice of available remedies. As bearing upon this question, it is most relevant to consider whether the District Court showed a sympathetic or mere niggling awareness of the proper scope of the Sherman Law and the range of its condemnation. Adequate remedies are not likely to be fashioned by those who are not hostile to evils to be remedied. The District Court's opinion manifests a stout purpose on the part of that court to enforce its thorough-going understanding of the requirements of the Sherman Law as elucidated by this Court. And so we have before us the decree of a district court thoroughly aware of the demands of the Sherman Law and manifestly determined to enforce it in all its rigors." *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 179-180 (1948). (dissenting opinion)

strictive business arrangements, including the allocation of geographic areas and classes of service among themselves (FF 51a-53, R. 758-60);[194] acquisitions of competing CSPS concerns (FF 49, R. 757; and unlawful discriminatory pricing for predatory purposes. (FF 55, R. 760)

To insure against predatory pricing, the trial judge devised a remedy not suggested by any of the parties but like that employed by other courts in lieu of dissolution or divestiture.[195] He imposed *quasi*-public utility regulation upon the alarm company defendants. By the terms of the decree, these defendants must file with the Department of Justice standard lists of all their "prices and terms of sale or servicing." Furthermore, they must report each quotation departing from those standard lists. For every such departure, of course, defendants "run the risk of being charged with invidious, illegal discrimination." (OR 4, R. 765-66). Thus, whether or not the alarm company defendants do indeed have monopoly power, the decree below requires disclosure of any attempt to manipulate their prices to forestall competition and thus effectively prevents them from attaining, maintaining, exercising or extending any such power.

Not content with imposing strict regulatory supervision on the defendant alarm companies' price policies, the court below also explicitly enjoined defendants from acquiring "the stock, assets, or business of enterprises in the designated market." It should be remembered that the trial court found that only two such acquisitions were made (FF 49, R. 757), and the more recent of those two was disclosed in advance to the Department of Justice, which ad-

194. As noted, the prohibitory language used is so broad and vague as to require recasting, but clearly if the judgment is sustained, the court below has evidenced its intention to deal fully with any restraints of trade, past, present or future.

195. In lieu of dissolution or divestiture, this Court and others have required antitrust defendants to serve all customers in the manner of a public utility, prohibiting anticompetitive discrimination. *United States* v. *Terminal Railroad Ass'n.*, 224 U. S. 383, 411-412 (1912); *United States* v. *New England Fish Exchange*, 258 F. 732, 748 (D. Mass. 1919); *United States* v. *Great Lakes Towing Co.*, 208 F. 733, 747 (N. D. Ohio 1913).

vised it would not challenge that acquisition. (UI, R. 3686, 552) Despite this limited evidence of competitive acquisitions, the trial judge made absolutely sure that, as he promised, his decree covered all "restraints of trade in which the record shows that the alarm companies have engaged directly or indirectly." (OR 4, R. 765-66).

Again, the District Court enjoined any restrictive or anticompetitive arrangements among the defendants or between any of them and third parties. If in fact agreements "for the orderly allocation of geographic areas and classes of CSPS" have been a "significant factor in defendants' growth," all such arrangements have been struck down and the possibility of any like them in the future eliminated.

Indeed, the decree reaches much further and calls for the total divorcement of the alarm company defendants by depriving Grinnell of all interest, even of purely investment character, in any of those companies. Since both the Government and the District Court based their views of illegality upon a claimed "monopolistic combination", breaking up of that combination is the furthest extent of the remedy called for. See *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 183, 189 (1944).

There is compelling record support for the conclusion that no futher measures were needed to remedy any market imbalance. Notwithstanding the trial judge's adverse conclusions, even his own findings show that defendants' asserted monopoly manifests many signs of weakness. Market shares alone do not indicate the effectiveness of allegedly dominant firms' power over the market, especially where the share of those dominant firms is declining. See *United States* v. *Aluminum Corp. of America*, 91 F. Supp. 333, 355 (S. D. N. Y. 1950). Here the court below not only found that defendants' share of subscribers and revenue has, since 1957, shown a declining trend, but also that there was no evidence that defendants were able to exclude or drive any of their competitors out of business. Indeed, the undisputed evidence shows that between 1945 and 1963 at least 35 new central stations have been established, twenty during the last six years before trial, and that these new concerns are steadily growing. (See pp. 141-44, *supra*)

Again, the court found weakness in defendants' "monopoly" position in that, contrary to the norm in monopoly situations, they do not have "unfettered power" to control their prices. And this was found to be true *even where defendants have no competition from other central stations.* (FF 46, R. 756) When, in addition, other undisputed facts are considered (*i.e.*, that the volume of CSPS business is growing extremely rapidly, that the rate of growth of non-defendant central stations is far higher than that of defendants, that there is remarkable ease of entry into the CSPS business and indeed that in recent years an accelerating rate of new entries has increased the number of non-defendant central stations more than five-fold (70% of those new concerns entering into competition with defendants in cities where they had established central stations)),[196] it is clear that defendants' position is unstable and destined to decline through the operation of natural competitive forces.[197] In view of these market developments and the demonstrated absence of any deterrent to new entries, if not in fact a lack of power by defendants to exclude competitors from the market, it is clear why the court below concluded that when the alarm company defendants were divorced from each other, stripped of any power to manipulate prices for anti-competitive purposes, and forbidden to acquire competitors, the allegedly monopolized CSPS market would right itself.

Clearly it was both proper and necessary to take into consideration these market potentialities and propensities.

196. See pp. 141-44, *supra.*

197. Prohibition of allegedly anticompetitive practices is generally recognized as likely to dissipate any asserted monopoly in most circumstances without divestiture, divorcement or dissolution. For example, it has been observed, "But though an increase in numbers and a decrease in concentration is usually a sufficient condition for making markets more competitive, it is not generally a necessary one. In many markets, practices of one kind or another—price reporting arrangements, patent pools, exclusive dealing contracts, etc.,—are indispensable buttresses to the power of leading firms; without them, a sharp reduction in that power would take place over time. * * * There would be many situations in which the maintenance of market power depended heavily on patterns of conduct, and thus market power could be limited without reorganizing firms" (Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis,* pp. 79-80, 93).

See *United States* v. *Aluminum Company of America*, 91 F. Supp. 333, 343 (S. D. N. Y. 1950). These existing and portended market developments should be given the greatest weight. Furthermore, it must be remembered that the trial court was careful to retain jurisdiction for "construction, correction or execution" of the decree in case its analysis of this highly complicated situation should prove incorrect and further measures be needed.

The decree below is effective in putting an end, for all time, to the violations urged by the Government and found by the District Court and is entirely adequate to remedy any market imbalance allegedly existing. We submit that no further relief could be justified on the record and on the findings made below.

C. The Government's Appeal

1. Divestiture of portions of ADT's central station business cannot be justified.

Nevertheless, the Government contends that the trial court erred in not requiring further relief[198]—most significantly in not ordering that ADT divest itself of substantial portions of its central station business.

Divestiture is treated with the utmost judicial restraint because of the harshness of the remedy and the complexities of forecasting its competitive and economic impact

198. The Government urges that "[i]n their pre-trial submission to the court the defendants agreed that, if the United States prevailed, an appropriate decree would include the substance of all of the government's proposals, although they differed in matters of detail and degree." (GJS, p. 10). This suggestion completely distorts the procedure which was followed below. Defendants submitted their proposed decrees in accordance with the "Handbook of Recommended Procedures for the Trial of Protracted Cases", adopted by the Judicial Conference of the United States in March 1960, 25 F. R. D. 351, 398. They submitted these decrees in the context of settlement negotiations in the hope that "a calm discussion of the government's objectives [might] lead to a resolution of the differences between the parties in advance of trial." *Ibid.* Surely it is improper to attempt to hold defendants to concessions which they were willing to make in the context of mutual compromise with hope that a lengthy trial, with all the risks incident thereto, including the possible entry of an adverse judgment opening the door to numerous, burdensome suits by treble damage claimants, could be avoided. In

against the standards of sound public policy. See, *e.g.*, Report, Att'y Gen. Nat. Com. to Study the Antitrust Laws, 353-54 (1955). The trial judge here has previously stated his recognition of the complex and sensitive considerations which attend divestiture. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 347-48 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954).

Divestiture is ordinarily called for only when the particular property to be divested was acquired pursuant to an illegal conspiracy or was the fruit of, or was used to achieve, an antitrust violation. See *United States* v. *National Lead Co.*, 332 U. S. 319, 351 (1947). Here there is neither finding nor contention that ADT acquired any of its central stations pursuant to illegal restraints of trade, and the Government apparently does not seek divestiture on that basis.

Rather the Government claims that divestiture is needed to "pry open" the market and reduce ADT's asserted market power. The Government made the same argument below to a trial judge who accepted the Government's view of ADT's market position. Significantly, he made no finding that ADT alone had monopoly power. The Government has not taken any appeal from the District Court's failure to so find.[199] As we have seen, the court below concluded only that ADT was a party to a "monopolistic combination" and that, when such combination was broken up, a further breaking up of ADT was not needed to "pry open" the market.

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such a context it is improper to urge that the defendants conceded that the Government's proposals were ever "appropriate" to this case. Moreover, the Government proposals were made before the lower court had formulated its conclusions as to the nature of defendants' violations of the law and were submitted upon the basis that, for such purposes alone, every issue of fact would be assumed to be resolved against the defendants. In fact the District Court has now rejected many of the Government's factual contentions. The present decree is entirely adequate to remedy the violations which were found below, and that is the sole issue. On what terms defendants might have been willing to settle this case before trial has nothing to do with that issue.

199. This Court does not make findings of fact not made by the court below. *Kelly* v. *Everglades Drainage District*, 319 U. S. 415 (1943).

We submit that this conclusion was correct and, in addition, that because of the primarily local nature of the central station business, divestiture is not only impracticable but cannot accomplish any further improvement in the competitive structure of this industry. Because of the limited geographic area in which a single central station can render service, an ADT station in one city can not be divested to compete with an ADT station in another city. The Government, therefore, proposed below that ADT be required to create, and then divest, a second central station in certain cities where only one now exists or to sell off existing service contracts in a specified amount to its competitors.

However, the Government did not propose that divestiture be ordered as to *every* ADT central station. The Government recognized that in many areas there is sufficient revenue for only one central station to survive, and it saw no reason why competition would be adversely affected if such stations were owned by ADT. Thus, the Government did not attack ADT's "natural monopoly" areas. Instead, based on its facile and unrealistic assumption that $125,000 in annual service revenues is enough to support one central station, the Government proposed that ADT be compelled immediately to establish a second central station (or sell off existing service contracts) in all those cities (48 in number) where its annual service revenues are $250,000 or more.

However superficially appealing such a proposal, it does not fulfill the purpose for which it was designed—to "pry open" markets for competition. First of all, there was no showing below that ADT's multi-market operation has deterred the entry of any competitor into any one particular city—*i.e.*, there was no showing that any local market needed "prying open" or that divestiture in one or more cities would in any way affect the competitive structure in another city. And as noted earlier, the great bulk of the many new entries have been in cities where ADT had established central stations. (See pp. 141-44).

Second, it is not the case that ADT presently has less CSPS competition in those cities where its annual service

revenue is over $250,000 and where the Government proposes divestiture. Rather the opposite is true.[200] In the larger cities where ADT's revenue is highest, it faces strong and ever-increasing CSPS competition. In those cities where its annual revenue is under $250,000 (those where it is least likely more than one central station could survive), ADT generally has no accredited central station competition. Obviously then, the Government's divestiture proposal—which only affects ADT's higher revenue areas—does not effectively "pry open" markets.[201] The markets which it reaches have typically already been "pried open" through the natural forces of competition.

Thus in general, as the trial judge undoubtedly recognized, very little would be gained by acceding to the Government's ill-considered and unsupported divestiture proposal. Even if it be assumed *arguendo* that there might be a few cities in which it would be desirable to establish a second central station, the cost in terms of economic performance and the practical difficulties of effecting the Government's proposal are staggering. This point was made at length in the briefs on relief filed by defendants below (R. 162-250) and presumably influenced the trial judge's decision not to order divestiture. We will here simply outline the major difficulties with the Government's proposal, noting first the following pertinent commentary by disinterested observers:

> "* * * [D]issolution or divestitures are not to be carried out at any substantial cost in terms of economic performance. The first implication of this proviso is that the size of existing plants sets a lower limit to any dissolution proposal, even where they are bigger than

200. In fact, ADT central stations in areas having competing accredited central stations provide the major share (more than 60%) of its CSPS revenue and net earnings. (R. 237)

201. While the Government's proposal that ADT sell off existing service contracts in certain high revenue cities might benefit ADT's already vigorous competitors in those cities, it would do nothing to alter the basic structure of competition there. And, of course, congressional concern in enacting the antitrust laws has been "with the protection of *competition*, not *competitors*." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 319 (1962) (Emphasis in original)

the size needed to achieve minimum costs. The obvious costs involved in the division of any existing technical unit preclude such measures. Second the plan of divestiture must contemplate the creation of viable firms with reasonable prospect for survival. Third, any absolute advantages of existing units must be taken into account in reorganizing market structures: The specific advantages that are peculiar to existing firms should not be cast away without consideration. In particular, though the progressiveness dimensions of performance play no part in evaluating the existence of market power or its reasonableness, no change in market structures which will significantly lower the level of performance in this respect should be made. Here again our interest in limiting market power is controlled by our interest in securing desirable economic performance. Considerations of fairness may further limit the scope of desirable reorganizations of market structure. Since the interests of customers, suppliers, and smaller competitors must be taken into account to some extent, at least the speed with which any going market arrangements can be changed will be limited." (Kaysen and Turner, *Antitrust Policy*: *An Economic and Legal Analysis*, p. 80.)

These observations have particular relevance to the present case. For instance, the Government's proposal that ADT be forced to create two central stations where one now exists flies directly in the face of the admonition that existing technical units should not be broken up.[202]

202. A similar problem was presented to Judge Wyzanski in *United Shoe*. There, considering a Government proposal that the defendant be divided into three, he stated: "United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts." (110 F. Supp. at 348). He noted that to create three companies out of United would create serious problems respecting the acquisition of physical equipment, the raising of new capital, and the allotment of managerial and labor forces. He concluded: "The prospect of creating three factories where one grew before has not been thought through by its proponents." *Ibid.*

Again, "the creation of viable firms with a reasonable prospect of survival" is a problem of monumental import in the present case—one that is not solved by the Government's divestiture proposal. The central station business is essentially local in nature, and each local unit at best generates only a small volume of profit annually. Breaking up such units contrasts sharply with breaking up a large manufacturing complex by divorcing its giant production units, each of which generate a large volume of revenue and profit annually. In such a case, unlike the situation here, there is very little chance that the separated units will wither and die. But in the central station business, a $30,000 annual before-tax profit for an individual central station is considered quite good. If such a station were to be split (and even assuming contrary to fact that expenses would also be reduced by one-half), there would exist a profit margin of only $15,000 for each new station. One bad year might well put one or both of these new stations out of business. In fact, the Government proposal calls for the break-up of ADT stations which are already operating at a loss. Clearly, most perceptive if not omniscient economic judgment would be required to create viable central stations and the complex facts essential to any such judgment are lacking in the record offered by the Government.[203]

Detailed economic analysis of the various cities in which ADT operates is required in order to determine in which of them the existing ADT stations allegedly could be split into two. The Government sought to avoid this morass of

203. Suppose that an incorrect economic prediction were made and, in a particular city, two unprofitable entities were created out of one now-existing profitable ADT enterprise. For ADT individually, this would constitute an improper confiscation of its property. Moreover, the economy as a whole would suffer a waste of economic resources. Eventually one or both of the unprofitable enterprises would have to go out of business. If one went out of business, then the local "monopoly" position would be restored and there would have been no net gain for competition. On the other hand, if neither of the two stations were able to survive, then the community would have been deprived of a valuable service devoted to the protection of life and property. It is simply just not the case that two units are always more desirable than one.

local economics with the facile assumption that in each city where ADT's annual service revenue equalled $250,000 or more, two viable central stations could be established. The Government based this assumption on its unsupportable assertion that when central stations reach $125,000 in annual service revenues, they have reached a "break-even" point.

There are many things wrong with the Government's proposals. First of all, the assertion that $125,000 in annual service revenue signals a break-even point is contradicted by the record below. That record conclusively demonstrates that operating costs and consequently the "break-even" points of central stations vary significantly from city to city. Thus, even non-defendant central station operators called as Government witnesses testified that the break-even points of their stations varied substantially depending on local conditions. ADT's own experience has shown that break-even points have not been reached in some instances where revenue was more than $480,000. (See pp. 22-23, n. 11, *supra*) In short, even if it could be said (which it cannot, as we shall see below) that divestiture should be required in those cities where two "break-even" stations could be established, no single figure, such as $125,000 in annual service revenue, can be set up to obviate the minute, city-by-city analyses which would have to be made.

Indeed, it would be entirely incorrect to assume that two post-divestiture stations established on any mere dollar formula would be viable and capable of effective competition. For instance, divestiture based on mere dollar volume would not take into consideration what types of services were to be given to the two entities. Some services have a higher rate of return than others (*e.g.*, sprinkler supervisory versus burglar protection[204]), so that it would

204. For example, a leading Government accredited central station witness from Chicago noted that the break-even point would vary from one station and city to another depending upon such considerations as the split between burglar and fire services, as one illustration. He pointed out that burglar service is more costly to furnish because of the necessity of frequent contacts with subscribers, false alarms, and so on. (GX 357, p. 35, R. 331-33)

be essential to insure that one station did not have only the lower return services. Again, some subscribers, because of the nature of their business or their proximity to the central station can be much more economically serviced than others. A jewelry store in a downtown location is much cheaper to service than a foundry in an outlying location.[205] If one station were given relatively more "jewelry stores" or downtown accounts to service than the other station, surely the survival prospects of the two stations would be radically different.

Again, and in conjunction with the other factors already mentioned, the question of the location of the new central station would have to be considered. The exact nature of this problem will be different in each city. It is clear that in every city location of the new station must be designed to achieve optimum proximity to accounts and the telephone exchange and lines while at the same time both avoiding wasteful duplication of service areas and yet achieving the maximum competition possible in the circumstances.[206] None

205. Central station witnesses typically testified that different types of customers cause differences in the costs of rendering the same type of central station service from one to another. To illustrate, a Kansas City operator testified: "First of all, there is a matter of telephone mileage, telephone wire mileage to be considered. And another thing to be considered is how much trouble do you feel that this account is going to give. In other words, the type of business has something to do with it. For instance, a super market and a drug store will give you more trouble than a jewelry store. Any business that is engaged in heavy traffic business, such as what I mentioned, are apt to give more trouble. A discount department store will need more service than other types of business possibly." (W40a, R. 5563-64, 497, 595-96)

206. The commercial realities of the business in central station services are such that in any given area the most advantageously located station possesses a significant competitive advantage. Illustrative of that fact is the testimony of one of the Government's leading witnesses, who operates an accredited central station in competition with ADT's five stations in Chicago: "Q. Does the fact that the American District Telegraph Company has five central stations here in Chicago put your company to any competitive disadvantage when bidding for accounts? A. Yes, sir. Q. In what respect, sir? A. We have only one central station. They have five scattered throughout the metropolitan area. Therefore, many times their line charges to a

of these complexities, or countless others like them, was taken into account by the Government's proposal, but their resolution is essential to the creation of viable entities. Moreover, it would be improper to create entities which are only capable of "breaking even". It is incumbent as a matter of sound policy to create entities which have a "reasonable prospect of survival" (Kaysen and Turner, *op. cit.* at p. 80), and this means that those entities should be capable of generating a fair profit in the long run.

To ensure the creation of such entities requires deep involvement in a veritable morass of local economics. A fair rate of profit would have to be calculated for each of the cities in which divestiture is sought. Many complex factors necessarily enter into such a calculation. For instance, a fair profit margin must be sufficient to provide a cushion for hard times (the probability of which will vary from city to city), and it should also be sufficient to ensure the capability of the central station to generate the necessary capital for growth and to attract new capital. Moreover, it is evident that today with marked technological advances any viable central station must have a sufficient profit margin to engage in research and development. Again, the Government proposal completely overlooked these problems.

There are many additional complexities in determining a fair profit margin. It might seem that a central station with annual revenue of $250,000 and before-tax profit of $30,000 would produce two central stations with annual revenues of $125,000 and before-tax profits of $15,000 each. The fact is, however, that central stations with a high volume of business typically have a considerably higher rate of profit than other stations. Thus, divestiture in the above hypothetical would likely lead to two central stations operating at a loss because each one has lost the volume necessary to generate sustaining profit.

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central station from a customer or prospect's place is much shorter than ours and this is almost an inevitable price disadvantage to us. [We pay] about three dollars per month per mile [for telephone lines and have some accounts as far out as 15 miles]." (GX 357, p. 66, R. 331-33; see also W9a, R. 4833, 497, 595-96)

In short, then, the creation of viable central station units is a problem of great complexity and would involve consideration of a great number of economic factors in each of the cities where divestiture is sought. At the same time, the problem is one of great delicacy, for a wrong prediction as to any one of these factors could well mean that one or both of the post-divestiture stations would soon go out of business. Against these considerations there was no countervailing showing. The Government showed neither that viable entities could be created in any one of the cities nor, if they could be, that competition would thereby be enhanced. This fact alone would be sufficient to sustain the trial court's determination that divestiture was improper.

There are, moreover, further considerations. For instance, what Kayson and Turner call "progressiveness" should not be lightly regarded. ADT's ability to engage in research and development should not be endangered by sweeping divestiture, especially since such punitive relief would do nothing to enhance the competitive structure.[207] ADT's research program cost over $1,500,000 in each of the several years preceding trial and has led to many significant developments in the protection of life and property. (R. 544-49) Surely the curtailment of such a program is not in the public interest, especially since much of the research is devoted to the protection of property vital to the national defense.

There are also considerations of fairness to ADT's subscribers. The Government's proposal would require ADT to sell off existing subscriber contracts. But what of those subscribers who might want to stay with ADT, who rely on ADT's long experience and high standards of service? Are they to be deprived of what they contracted for and what they prefer? And if these subscribers, perhaps contrary to their wishes, are required to deal with ADT's competitor, then they would seem to be just as much at the mercy of

207. There can be no question that divestiture would affect ADT's ability to engage in research and development. Compare Judge Forman's remarks in *United States* v. *General Electric Co.*, 115 F. Supp. 835, 871 (D. N. J. 1953).

that competitor as they are now claimed to be at the mercy of ADT.

Furthermore, under the Government's proposal, divestiture would generally take place in ADT's more profitable areas rather than in its low profit or deficit operating areas. ADT's operations in the latter areas would, as the result of divestiture elsewhere, bear additional overhead expense. Ultimately ADT would either have to reduce the quality of its service in these areas or cease serving them altogether. If ADT leaves these areas, they are unlikely to attract new entrants, and thus subscribers would be deprived of central station of protection and the benefits of its competition with other protection services and systems.

This summary sufficiently demonstrates that divestiture here is neither necessary, practical, nor fair.[208] It is not necessary because the trial judge devised a remedy entirely adequate to remedy any market imbalance and because divestiture would not significantly stimulate local competition. It is not practical because it would involve the disruption of existing technical units and because the creation of new viable units, if possible at all, would require involvement in a great morass of local economic data and would require economic predictions of a delicacy and complexity for which a court is not equipped. It would not be fair to ADT because, apart from the fact that its stations were not illegally acquired, a wrong prediction in respect to any one of these many complex, hard-to-predict economic matters could lead to the confiscation of ADT's local business and to the disruption of its entire system. It would not be fair to many of ADT's subscribers because it would deprive them of the right to the service of their choice.

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208. "Such 'judicial restraint' reflects the Supreme Court's view that, since 'divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available.' As one court noted, 'Judges in prescribing remedies have known their own limitations.' *Thus, courts as a rule have refused divestiture in the absence of some clear showing of its necessity to insure effective competition, its practicality and, in light of surrounding circumstances, its basic fairness.*" Report, Att'y. Gen. Nat. Com. to Study the Antitrust Laws, 353-54 (1955)

2. *Enjoining five-year subscriber contracts and retention of title to systems cannot be justified.*

The Government next complains that the court below erred in failing to enjoin defendants from entering into "long term" contracts with their subscribers and in failing to require defendants to sell to these subscribers the systems installed on the subscribers' premises. The Government does not suggest that these business procedures are in themselves restraints of trade. Rather the Government claims that they "were important parts of the pattern of monopolization." (GJS, p. 15). However, the trial judge made no such finding. Indeed, these forms of doing business are traditional not only in the central station business but in the other electric protection service businesses as well. They are followed by most, if not all, CSPS firms and the trial judge so found. (FF 6, R. 748; see pp. 68-69, n. 87, *supra*)

ADT opposes the granting of relief along these lines because: (1) retention of title to installed equipment and contracts of reasonable duration are integral to the CSPS business and serve a beneficial economic function; (2) relief as demanded by the Government would apply to defendants alone in the CSPS field and place them at a great disadvantage *vis-a-vis* competitors who are not before the Court; and (3) such relief would disadvantage customers of defendants who desire contracts of more than one year and ownership of the equipment by defendants.

Judge Wyzanski also considered similar contentions in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954). There, in reference to a suggestion that defendant be forbidden to lease its machines but rather be required to sell them, he said:

> "The Court agrees that it would be undesirable, at least until milder remedies have been tried, to direct United to abolish leasing forthwith. United is free to abolish leasing if it chooses to do so, but this Court hesitates to lay down any absolute ban for two reasons.

First, if a ban were immediately applied, a substantial number of shoe factories would probably be put out of business, for they have not the assets, nor the capacity to borrow, requisite to purchase machines, even on conditional sales agreements. Second, if this Court forbade United to lease machines, it could not apply a similar ban to its competitors. This would constitute for United a major not a minor competitive handicap if one accepts the testimony of the large number of shoe manufacturers who have already expressed their preference for leasing rather than buying machines." (110 F. Supp. at 349.)

ADT's service contracts have long provided that the systems of equipment and devices installed on a customer's premises would remain the property of ADT. This retention of title serves a useful economic function. It guarantees uniform and compatible equipment both in the central station and on the subscriber's premises and thus provides for the quality of service essential to the business. It provides for centralized responsibility for the inspection, maintenance and upkeep of all elements involved in rendering central station service. It guarantees ready access to the devices which must be maintained. Like other CSPS concerns, because it owns and is responsible for the equipment on its subscribers' premises, ADT has built up an inventory of standardized equipment and skilled personnel experienced in the repair and replacement of that equipment. This in turn has meant that ADT has been able to respond quickly and effectively in emergency situations.

A corollary to the provision in ADT contracts that it retains ownership of the equipment is that ADT undertakes to repair or replace the installed equipment during the life of the contract *without any charge to the subscriber.* Thus subscribers are freed from the entire expense and burden of repair or replacement, a matter of substantial economic benefit to them. For example, the epic Kansas City flood caused damage to equipment on subscribers' premises requiring immediate repairs and replacements at a cost of

$100,000, all of which was borne by ADT without any charge to the many affected subscribers. (R. 528-30, 561-62)

Moreover, it is not simply the judgment of alarm companies alone that retention of title is essential to the requisite protection against fire and burglary. The National Board of Fire Underwriters (NBFU) and Underwriters Laboratories, Inc., for example, all require that equipment installed on a subscriber's premises be owned not by the subscriber but by the central station operator. (GX 1, R. 790, 792; GX 3, R. 847, 848, 327) Thus, if ADT were to sell the installed equipment to its subscribers, it would lose the approval or certification of these underwriters' organizations and its subscribers would not qualify for a premium discount.

It is evident, then, that retention of title in the alarm company offers mutual benefits to the company and its subscribers—benefits which would disappear if the company were even voluntarily to sell its devices to its subscribers. But the request for relief goes far beyond such a voluntary offer; it would *compel* ADT to sell and subscribers to buy the devices in connection with the execution of a service contract. Such a requirement would not only eliminate for everyone these substantial benefits, which have been traditional in the alarm industry overall, but it would also subject ADT to intolerable competitive handicaps. It is obvious, for example, that if no ADT subcribers could qualify for an insurance premium discount, ADT would simply be out of the insurance-approved segment of the CSPS business—the very market defined by the Government and the court below.

Other competitive disadvantages would result for ADT if a court required that its customers purchase all equipment installed on their premises. There are many reasons why subscribers do not find such an arrangement beneficial and would turn to competitors of ADT who could offer the traditional leasing arrangement. Thus, if ADT were required to sell its equipment, the initial money outlay required of a subscriber would be drastically increased, since ADT would have to recover upon the sale its entire cost

plus a reasonable profit. A purchase arrangement would require the customer to commit a large amount of money today, whereas the present form of service contract permits smaller payments, spread out over a period of time. Moreover, as owner of the equipment the subscriber would have to bear all the risks and burdens of maintenance and replacement which ADT now bears.

It is obvious, therefore, that compulsory sale would place ADT's service beyond the reach of many desiring protection and place ADT at such a competitive disadvantage as to jeopardize its ability to survive in the CSPS field. It is almost inconceivable that many classes of ADT's customers would be willing to buy protection equipment. For example, it is hardly in the interest of tenants, particularly short term tenants, to have forced upon them title to ADT's devices, conduits and wiring systems. These tenants would bear not only the initial expense of purchase, but also the burden of removing and of disposing of the devices, conduits and wiring systems when they leave the premises. In such a situation it seems highly unlikely that the tenant would purchase service from ADT.

Furthermore, the Government suggested below that title to equipment in existing installations be relinquished by ADT to the subscriber *without further charge*. This request is apparently based on the Government's theory that ADT recovers all of its costs by means of its installation fee. This theory is totally at variance with the facts. The fact is that ADT, on a system-wide basis, secures advance service charges, or installation fees, representing less than 65% of its bare costs, plus certain supervisory costs. (R. 229, 555-62) Furthermore, it is clear from the record below that even these cost figures are not complete. They include only direct material and labor costs and such supervisory costs as are directly applicable to installation activities. General and administrative expenses and selling expenses are not taken into account, nor is any margin for profit included. Thus the Government's proposal that ADT transfer equipment in existing installations to its subscribers without further charge would work an unconstitutional

confiscation of ADT's property. See *Hartford-Empire Company* v. *United States*, 323 U. S. 386 at 414, 420 (1945), *clarified*, 324 U. S. 570 (1945).

The Government's request that ADT be enjoined from entering into contracts of more than one year in duration would also prevent ADT from offering customers something which is beneficial to them and generally available from ADT's competitors. This again would place ADT at a great competitive disadvantage. For example, many potential customers desire a contract of sufficient term to protect themselves against annual price increases or to avoid the administrative bother of negotiating, considering and executing a new contract each year. Such potential customers would have to turn elsewhere.

Moreover, if ADT were forced to enter one-year contracts for all customers, as the Government demands, or even just for customers desiring them, there would inevitably be created upward pressure on the price of its services. Thus, mandatory one-year contracts would create tremendous additional administrative expenses for ADT. One-year contracts would increase fivefold the sales effort, the work of preparing contracts, payment and billing forms and other details involved in handling subscriber contract matters. Obviously ADT's administrative expenses would be substantially increased.

If ADT is limited to one-year contracts and compelled to part with title to its equipment, it would be under pressure to charge its customers for repair work done, because with a contract period limited to one year there is no assurance that the subscriber will renew for a sufficient length of time to enable ADT to recoup the cost of repair. Thus ADT will have to charge for repairs when made, again raising the price at which ADT can offer its services and creating another great competitive disadvantage.

In summary, then, the Government's proposals would cause incalculable damage to ADT's business and place it at an overwhelming competitive disadvantage. Furthermore, the Government has brought forth no reason why such relief should be granted. It only argues that these

traditional procedures in the alarm business are here "parts of the pattern of monopolization." We submit that they are no such thing but rather are simply the most efficient means of conducting the CSPS business, and that they are employed by almost all of the firms in that business, regardless of size or market position.

3. *No justification is shown for requiring ADT to manufacture equipment for other central stations or for granting visitation rights to the Government.*

The Government requests that two further provisions be added to the decree: (1) that defendants should be required to sell upon non-discriminatory terms any devices manufactured by them for use in furnishing CSPS service, and (2) that the Government should be given visitation rights as an adjunct to enforcement of the decree. Neither of these proposed additions to the decree is necessary.

Respecting the first proposal, that ADT be required to sell the equipment which it now manufactures for its own needs, the simple answer is that the Government made no showing below and the court did not find that ADT has a monopoly in the manufacture of such equipment or that ADT's competitors are unable easily to acquire it elsewhere. Thus, there is no reason why ADT should be treated differently from any other manufacturer and deprived of the right unilaterally to choose its customers or to sell to none.

Concerning the second proposal, contrary to the implication in the Government's Jurisdictional Statement, it simply is not true that visitation rights are part and parcel of every antitrust decree. Thus, in *Maryland & Virginia Milk Producers Association, Inc.* v. *United States*, 362 U. S. 458 (1960), the Government also appealed from the District Court's refusal to grant the Government general visitation rights as to the defendant's records and employees. This Court, noting the District Court's provi-

sion adequately protecting the Government with subsequent orders when the occasion necessitated, stated:

> "The formulation of decrees is largely left to the discretion of the trial court, and we see no reason to reject the judgment of the District Court that the relief it granted will be effective in undoing the violation it found in view of the fact that it also retains the cause for future orders, including the right of visitation if deemed appropriate." (362 U. S. at 473)

Here, as there, the Government is adequately protected by the provision of the decree which allows any party to apply to the District Court for the "correction, construction or execution" of the decree. (R. 769) Moreover, here, unlike that case, the Government has been given relief far more significant than visitation rights in the provision that defendants file with the Antitrust Division their standard schedules of prices and terms and any variations therefrom. (R. 768-69) We submit, therefore, that there is no need to add to the burdens already placed upon defendants by the decree.

In any event, if this Court determines that the decree entered by the trial judge is not sufficient to remedy the violations of the antitrust laws which were found, this case should be remanded for a hearing *de novo* before a new trier of fact. It is apparent that there are not sufficient findings of fact to justify relief more extensive than that granted by the trial judge and it is not for this Court to make findings of fact not made by the court below. *Kelly* v. *Everglades Drainage District,* 319 U. S. 415 (1943). If there are any errors in the relief granted below, then a new trier of fact should be allowed to make an entirely fresh start on the whole of the problem.

CONCLUSION

For all of the above reasons stated in support of ADT's appeal, this case should be reversed and remanded for dismissal of the complaint on the ground of failure of proof. In the event this Court does not agree, then ADT joins in the alternative disposition requested by Grinnell, *i.e.*, reversal and remand for a new trial.

Respectfully submitted,

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APPENDIX A

GX 318, R. 2400-01; GX 319, R. 2428-31; GX 320, R. 2480-81, 2486-87; GX 324, R. 2506-08; GX 325, R. 2528-29; GX 326, R. 2550-51, 2562-63, 2579, 2625; GX 329, R. 2654, 2659-61, 2663, 2678-79, 2685-87; GX 330, R. 2717; GX 331, R. 2783; GX 333, R. 2810-11, 2831; GX 336, R. 2863-64; GX 337, R. 2883; GX 342, R. 2953-55; GX 343, R. 2965-66; GX 347, R. 3014; GX 355, R. 3089-91; GX 356, R. 3105-07; GX 357, R. 3117-20; GX 360, R. 3182-83; GX 362, R. 3212-13, 331-35; W 2a, p. 14; W 5a, pp. 142-43; W 6a, pp. 62-63, 68; W 7a, pp. 25-26; W 8a, pp. 7, 17-18, 48-49; W 9a, pp. 43-44, 87, 107-09; W 10a, pp. 12-13, 37-38; W 13a, pp. 50, 58-64; W 15a, pp. 31-33, 53-54, 59; W 14a, pp. 31, 42-43; W 16a, pp. 16-18, 51-53, 58; W 17a, pp. 119-126; W 19a, pp. 41-46, 80-81, 89-90; W 21a, pp. 11-12; W 23a, pp. 24-25, 29-30, 37-39; W 24a, pp. 70-72, 95-96; W 25a, pp. 15-17; W 26a, pp. 6-9; W 27a, pp. 26-27, 37, 40-41, 44-45, 48-49; W 28a, pp. 13-14; W 29a, pp. 26-28; W 30a, pp. 35, 41-45; W 31a, pp. 16-17, 59-61; W 34a, pp. 50-51; W 35a, pp. 35-36, 51-57; 121-24; W 37a, pp. 29-30, 39-40, 61, 69-73; W 38a, pp. 39-40, 103-04; W 40a, pp. 52-53, 60-71; W 42a, pp. 11-12, 26-27, 29-31; W 45a, pp. 30-31, 39-44, 68; W46a, pp. 24-25; W 47a, pp. 92-95, R. 497, 595-96; E1-E2, R. 3246-50, 398-99.

APPENDIX B

This appendix consists of a partial summary of evidence demonstrating that accredited central station services are in fact interchangeable and competitive with other forms of protection. Testimony is tabulated alphabetically by witness, first as introduced by the Government and then as introduced by the defendants.

1. *Emerson M. Booher, Dayton Electronics Alarm & Signal, Inc., Dayton, Ohio.* The witness now operates an accredited central station, offering a full range of such services. Before his central station was accredited in 1957, he furnished local burglar alarm service in competition with ADT, offering that service to the same prospects ADT solicited for its long-established accredited central station services. He won some of those prospects and ADT won some. Watchman's service, which he has furnished, also competes with central station services. Until he opened his central station in competition with ADT's, the City of Dayton allowed direct connected systems running to the fire department. When he opened his central station, he converted about 150 of his local alarm service subscribers to his central station services. (GX 318, R. 2392-99, 2407-10, 331-32)

2. *Clarence S. Damon, Damon Alarm Corporation, Kansas City, Missouri.* At the time this witness testified, he operated an unaccredited central station and also furnished local alarm and direct connected services. He testified that both local and central station alarms serve the same types of subscribers. Even after ADT was forced to reduce its central station prices in competition with his unaccredited central station services, he was able to win customers who had contracts with ADT. He testified that ADT personnel complained about his low prices and his solicitation of customers under contract to ADT. (GX 324, R. 2497-98, 2500, 2502-03, 2505-09, 2515, 331-32)

Appendix B

3. *James W. Flotron, Potter Electric Signal Co., St. Louis, Missouri.* This witness from an accredited central testified that such services are furnished to "the general run of commercial accounts" and identified local alarm companies as competitors. In St. Louis some stores of the Robert Hall clothing chain use his local burglar alarms while others use ADT's central station service. (GX 326, R. 2545-47, 2555, 2563, 2605-06, 331-32)

4. *Joe Forman, formerly of Owl Protective Company, Philadelphia, Pennsylvania.* Owl provides accredited central station services, but the witness identified local alarm companies among its competitors and testified that there are local alarm service subscribers who "should be a very good prospect for central office." He also testified that before Owl's central station was accredited it won contracts for its burglar alarm service from subscribers to Holmes' central station service. (GX 328, R. 2627, 2639-41, 2645-46, 331-35)

5. *Sarah E. Jackson, Denver Burglar Alarm Company, Denver, Colorado.* The witness from this company, which furnishes both local alarm and accredited central station services, testified that a given type of customer, such as jewelry stores, liquor stores, clothing stores, pawn shops, and so on, may use either of those services and that companies like Diebold, furnishing direct connected systems and services, also compete against those services. (GX 333, R. 2790-91, 2801-02, 2809, 331-35)

6. *Thomas M. Lewin, Automatic Alarm Corporation, Minneapolis, Minnesota.* This company furnishes both accredited central station and local alarm services, and its witness testified that similar types of businesses, such as warehouses or stores, with the same general type of premises, the same risks and the same protection problems, choose both central station and local alarm services. It "* * * is a continuing program" on his part to attempt to convert his local alarm subscribers to his

central station services. He recognizes that establishments which are good prospects for central station services may be satisfied with watchman protection or even with just insurance. (GX 336, R. 2855, 2857, 2859-61, 331-35)

7. *Gerald J. Linder, American Fire Dispatch, Inc., Los Angeles, California.* This witness, whose company operates an accredited central station and also furnishes local alarm services, stated that unaccredited central station service is definitely competitive and is used by the same types of customers. Since he opened his central station, he has switched about 50 of his local alarm service subscribers to central station services. (GX 337, pp. 62-64, 93, R. 2880, 331-35)

8. *Kenneth McFarlen, Republic Alarm Company, San Jose, California.* This company furnishes unaccredited central station and local alarm services. Its witness testified that it competes with ADT and "very often" ADT is trying to sell central station services to the same prospect to whom he is trying to sell local alarm services. Further, ADT has to reduce its prices in competition with this company's services. (GX 340, pp. 47-52, 57-61, R. 2920, 2923-26, 2930-31, 331-35)

9. *Peter J. Neumann, Albany Protective Service, Albany, New York.* The witness from this company, which furnishes accredited central station, proprietary, auxiliary and local alarm services, testified that local and central station systems are very similar and both services are used to protect the same types of business. He has converted about 50 of his local alarm subscribers to his central station services. (GX 341, R. 2934, 2938, 2941-42, 331-35)

10. *Donald Pillsbury, National Bureau of Casualty Underwriters, New York, New York.* This representative of one of the underwriters' agencies defined the "alarm industry" as including both central station and local alarm

services, stating that in almost every part of the country there is competitive bidding between these services. He added that telephone answering service is a competitive element of increasing concern to the alarm companies. (GX 346, pp. 53-54, 77, R. 2995-96, 331-35).

11. *Charles C. Porch, Factory Mutual Rating Bureau, Providence, Rhode Island.* This witness is an official of an agency representing carriers who write fire and allied hazard insurance for large industrial risks. Based upon his experience, he knows that plants with similar types of occupancy, usage and protection problems choose either central station, proprietary, direct connected or watchman services. (GX 348, pp. 19-20, R. 331-32)

12. *James E. Rose, Michigan Still Alarm Co., Detroit Michigan.* This witness provides accredited central station, direct connected and local burglar alarm services. He has customers who have elected to take local alarm service even though he has also offered and encouraged them to take central station service. When he opened his central station, he converted as many as 150 to 200 of his local alarm subscribers to his central station services. (GX 351, pp. 5-9, 77, R. 3036-37, 3046, 331-32)

13. *George A. Smith, Smith Detective Agency & Nightwatch Service, Dallas, Texas.* This company furnishes accredited central station and local alarm services. It offers both services to the same prospects and competes with both unaccredited central station and local alarm companies, losing prospective customers to both. (GX 355, R. 3082, 3096-97, 331-33)

14. *Maurice G. Sondock, McCane-Sondock Detective Agency, Houston, Texas.* This witness, from a firm furnishing both accredited central station and local alarm services, testified that similar types of establishments use both those services. Often establishments that he considers to be central station prospects advise him that they deem in-

surance to be sufficient protection. (GX 356, p. 4, R. 3111-12, 331-33)

15. *Sidney Stackler, Central Watch Service, Chicago, Illinois.* This company operates an accredited central station and also furnishes watchman service. The witness testified that he offers both watchman and central station services to the same prospects and that watchman service subscribers are central station prospects. He also declared that local alarm competitors win prospects to whom he is offering his central station services. When he opened his central station he converted 40% of his 500 watchman service subscribers to central station service and a good portion of those who chose not to convert had the same kind of protection problems. (GX 357, pp. 82, 132-33, 143-45, R. 3136-38, 331-33)

16. *Alex Venners, Federal Engineering Company, Washington, D. C.* This witness from an accredited central station company identified local alarm service companies as competitors. (GX 360, R. 3169-70, 331-33)

17. *Ira E. Warlick, Reliance Protective, Inc., Tulsa, Oklahoma.* This company, operating the only accredited central station in Tulsa, furnishes such services in the fire and burglary fields. Its founder testified that he competes with unaccredited central station, direct connected, telephone answering, auxiliary, proprietary, local alarm and watchman services. (GX 361, R. 3186, 3192-95, 331-33)

18. *Morris Weinstock, Morse Signal Devices of California, Los Angeles, California.* This company furnishes both accredited central station and local burglar alarm services. It competes with unaccredited central station, telephone answering and local alarm services. Many of the same types of establishments, such as jewelers and liquor stores, are customers for either local alarm or central station services, and subscribers to watchman service would otherwise be customers for central station services. (GX 362, R. 3200-01, 3205-06, 3216-20, 3226, 331-33)

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19. *Samuel G. Wight, Central Alarm Company, Ltd., Honolulu, Hawaii.* The president of this company, which operates the only accredited central station in Honolulu and furnishes solely that type of service, testified that accredited central station services are definitely in competition with local alarm, proprietary, auxiliary, telephone answering and watchmen services. (GX 363, R. 3235, 3237-39, 331-33)

20. *William Baggett, Mossie Burglar Alarm Co., Kansas City, Missouri.* Mossie operates an unaccredited central station in the burglar and holdup fields and also provides local and direct connected burglary service. The witness testified that Mossie competes with ADT and other central station companies and that he has often been successful in bidding his unaccredited central station services against ADT's accredited services. He stated that a number of cusomers who could readily afford central station service use local and direct connected services, and cited as specific examples jewelry stores and banks. (W40a, R. 5566-73, 5577-79, 5583, 497, 595-96)

21. *Morton Baizer, Bell Burglar Alarms & Eagle Protective Company, Philadelphia, Pennsylvania.* This company provides local burglar service, has just opened a central station and is still awaiting accreditation. The witness outlined all classes of establishments as local alarm prospects, listed a number of local customers with large inventories to protect and stated that he solicited prospects for local alarm service in direct competition with central station service. (W14a, R. 4956-59, 4977-78, 4980, 4982-85, 497, 595-96)

22. *Clarence Irvin Baker, Merchants Alarm Service, St. Louis, Missouri.* Merchants Alarm is in the local burglar alarm business with a few direct connected customers. The witness stated that he competes with ADT in offering those services and that he formerly offered unaccredited central station services, which also competed with ADT.

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Although some central station subscribers may tend to be larger, some larger companies also have local alarm service, and generally the types of establishments purchasing local service are the same as those serviced by central stations. (W38a, Vol. II, p. 7, R. 5493, 5517, 5522, 5526-28, 497, 595-96)

23. *Ray Brechbill, ADT, New York, New York.* This witness testified at the trial that ADT experiences competition from direct connected, auxiliary, local and proprietary alarm services, as well as insurance. He cited specific examples of subscribers, such as the State liquor stores in Ohio and a number of banks, which converted from central station to direct connected service or other forms of protection. (R. 388-90, 396-97)

24. *Loys C. Bridges, Greenville Avenue Patrol, Dallas, Texas.* Greenville supplies unaccredited central station, direct connected and local alarm services. It also furnishes patrol and watchman services. The witness testified that he competes with accredited central station concerns. (W30a, pp. 35-36, R. 5388-92, 497, 595-96)

25. *John W. Callaghan, Alarm Systems, Inc., Kansas City, Missouri.* This local burglar alarm witness testified that he competes with two central station concerns, one accredited and one unaccredited. (W7a, R. 4778, 497, 595-96)

26. *Claude L. Carpenter, Dawn Patrol Burglar Alarm Company, Detroit, Michigan.* The witness furnishes unaccredited central station, local alarm and direct connected services. He testified that in his day-to-day efforts he encounters competition from ADT and other central station concerns. (W22a, pp. 69-70, R. 5183, 497, 595-96)

27. *Edward Corrier, ADT, Oklahoma City, Oklahoma.* This ADT witness identified classes of customers similarly situated who take central station, proprietary, direct connected or local alarm services, including warehouses,

pawnshops, liquor stores, jewelry stores and banks. Although there are no other accredited central stations in the Oklahoma City market, ADT has had to reduce prices there to secure business in competition with other forms of protection. (R. 465-72)

28. *James H. Coffey, Circle Alarm Corporation, Indianapolis, Indiana.* Circle Alarm furnishes unaccredited central station and some direct connected services. The witness stated that he competes with ADT and other central station firms and solicits the same accounts. (W19a, R. 5137-39, 5141-42, 5149-51, 497, 595-96)

29. *Julian C. Cohn, Robert Hall Clothes, Inc., New York, New York.* This witness testified that a number of stores in this national clothing chain changed from accredited central station to local alarm service although there was no change in the nature or scope of their protective requirements. (W32a, R. 5419-21, 497, 595-96)

30. *William A. Crichton, ADT, Detroit, Michigan.* This ADT witness testified that he has sold central station and local alarm services to the same types of establishments, including jewelry stores, department stores, auto supply stores and warehouses. Half of his local alarm customers were prospects for central station service. (R. 448-54)

31. *Eric David, Tattle-Tale Alarms, Baltimore, Maryland.* This company provides both local burglar alarm protection and protection through a telephone answering service. The witness identified accredited central station companies as his major competitors and states that he bids against them for the same prospects. (W10a, R. 4852-55, 4858, 4860, 497, 595-96)

32. *Gerald R. DeLue, Frontier Guard and DeLue, Inc., Denver, Colorado.* This company furnishes unaccredited central station, local alarm and guard services, primarily in the burglar field. It competes with accredited central station concerns. Similarly situated customers use both

local and central station service. (W27a, p. 70, R. 5316-17, 5330-32, 5340-41, 497, 595-96)

33. *Gordon Dillard, Magnetic Alarm Company, Houston, Texas.* Magnetic furnishes unaccredited central station, direct connected and local alarm services. The witness testified that his unaccredited central station service competes with ADT and other accredited central station firms. (W37a, R. 5483, 5485-86, 497, 595-96)

34. *R. Stafford Edwards, Edwards Company, Inc., Norwalk, Connecticut.* This witness manufactures fire and burglar alarm equipment for local, direct connected, auxiliary and proprietary systems. His systems are installed in the full range of larger commercial and industrial establishments in the United States. He has been able to convince customers who specified central station service to use his systems instead. (W25a, R. 5263-68, 497, 595-96)

35. *Arthur William Fruh, A. W. Fruh & Company, Chicago, Illinois.* This witness provides unaccredited central station, direct connected and local alarm services. He identified accredited central station companies as being among his principal competitors. (W28a, R. 5348-5350, 497, 595-96)

36. *Harry Gerber, Harry Gerber & Co., Inc., Glendale, California.* This witness provides unaccredited central station and local alarm services in the burglary and hold-up fields. He stated that he competes with accredited central station concerns. (W29a, R. 5366-70, 497, 595-96)

37. *Francois Guibert, Newark District Telegraph Company, Newark, New Jersey.* This company furnishes accredited central station, proprietary and local alarm services in the fire and burglary fields. The witness testified that in different categories of business, similar establishments are served by central station, local, direct connected and proprietary services. (R. 353, 361-62, 367-70)

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38. *Grant Richard Hamilton, Day & Night Burglar Alarm Co., San Francisco, California.* This representative of a local burglar alarm company testified that he competes with ADT and other central station burglar alarm firms. He testified that such high-inventory concerns as jewelers, furriers and liquor stores are customers for his local service. (W23a, R. 5207-08, 5213-14, 497, 595-96)

39. *Kenneth M. Holmes, Dallas Burglar Alarm Co., Dallas, Texas.* This local burglar alarm witness testified that he competes with ADT and other central station companies. (W21a, R. 5159-61, 497, 595-96)

40. *Frank W. Houghton, Automatic Alarms, Detroit, Michigan.* This witness testified that his company supplies both local and central station services to the same categories of customers, including jewelry stores, banks, department stores, supermarkets, warehouses and small factories. (W12a, R. 4900-04, 497, 595-96)

41. *Alfred Wayne Jackson, Diebold Incorporated, Canton, Ohio.* Diebold manufactures and sells on a nationwide basis burglar and holdup alarm equipment for direct connected and local systems, with accompanying service contracts. It serves high inventory customers such as supermarkets and jewelry stores. In areas where direct connected service is permitted, Diebold competes with that service against ADT and other central station companies and now serves some former central station customers. (W24a, p. 142, R. 5217-18, 5220-21, 5226-30, 5238-40, 5242-43, 5246, 497, 595-96)

42. *Oliver T. Joy, Notifier Corporation, Lincoln, Nebraska.* This company manufactures and sells equipment which is used in direct connected, telephone answering and proprietary operations. The witness stated that the users of his equipment are definitely in competition with central station companies. The Seattle World's Fair installed one of his proprietary systems in preference to ADT's central station service. (W41a, R. 5606-07, 5611-12, 497, 595-96)

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43. *George J. Kusta, Arrow Electric Protection Co., Chicago, Illinois.* Arrow supplies unaccredited central station, direct connected and local protection, primarily in the burglary field. It competes with ADT and obtains the same type of customers. (W9a, R. 4829-30, 4841-42, 497, 595-96)

44. *Russell W. Laxson, Minneapolis-Honeywell Regulator Co., Minneapolis, Minnesota.* This company manufactures and sells equipment for use in proprietary and local systems, with service and maintenance contracts. Its products serve the same purpose as central station protection and one displaces the other. It competes for customers with ADT. (W39a, R. 5539-41, 5548-49, 497, 595-96)

45. *Robert E. Leeper, U. S. Burglar Alarm Co., Inc., Los Angeles, California.* This company provides unaccredited central station and local burglar alarm services. The same types of cusomers use both local and central station services. This company bids in competition with ADT and other central station companies. (W45a, pp. 39-44, R. 5663-64, 5672-74, 497, 595-96)

46. *Harold Willard Lewis, California Burglar Alarm, San Carlos-Redwood City, California.* This witness, who supplies local and direct connected alarm service, testified that he competes for the same prospects with ADT and other central station companies. (W15a, pp. 43-48, R. 497, 595-96)

47. *Kenneth V. McCluskey, Howard Stores Corp., Brooklyn, New York.* This witness testified that 80% of the approximately 140 stores in the Howard chain changed from accredited central station to local burglar alarm service even though there was no change in protection requirements. (W33a, R. 5423-25, 497, 595-96)

48. *James O. Maxey, ADT, New York, New York.* This witness, who is responsible for Government sales, testified that Government installations use central station, direct

connected, proprietary and local alarm systems obtained from ADT and its competitors. They switch from one type to another and the same types of installation have different types of service. (R. 489-92)

49. *John S. Nacey, Howe Electric Company, Chicago, Illinois.* This company manufactures, sells and installs fire alarm equipment in connection with direct connected, local, auxiliary and proprietary systems. These systems compete with central station systems for similar establishments. (W34a, R. 5440-41, 5448-51, 5454-57, 497, 595-96)

50. *Mary B. Nordsiek, Sentinel Protective Service, Indianapolis, Indiana.* This supplier of local burglar alarm service testified that her stiffest competition comes from suppliers of central station systems, including ADT. (W34a, R. 5650-51, 497, 595-96)

51. *Milton Pierce, Guardian Alarm Co., Detroit, Michigan.* This company supplies unaccredited central station, direct connected and local burglar alarm services. It renders central station service to the same types of establishments which use the local service and ADT is its chief competitor. The company has solicited and won accounts for local service where ADT was attempting to sell central station service. (W31a, R. 5409-12, 5415-16, 497, 595-96)

52. *Arthur Schwartz, Certified Burglar Alarm Systems, Inc., Chicago, Illinois.* Certified furnishes local and direct connected burglar alarm service. It has no central station although some of its local alarms are tied to other companies' central stations. The witness' customers include banks, chain stores and other central station prospects. He competes with central station concerns and claims that he gives ADT "as much trouble as anyone" in Chicago. (W17a, pp. 144-45, R. 5063-64, 5071-72, 5098, 5101-04, 496, 595-96)

53. *Joseph Siegel, Alert Alarm Company, Cleveland, Ohio.* This local burglar alarm witness competes with the

central station services of ADT and Morse as well as Allied's telephone answering service. (W8a, R. 4799, 4804-05, 497, 595-96)

54. *Thomas J. Smith, Alarm Engineering Co., Kansas City, Missouri.* This witness was once a dealer for the Notifier company in Kansas City, Missouri, selling and servicing direct connected and proprietary fire systems. At that time he was in competition with ADT and today he has an approved central station. He named a direct connected and local alarm concern (Minneapolis-Honeywell) and an unaccredited central station concern (Damon) as current competitors. (W6a, R. 4713-15, 4733-35, 4738-39, 497, 595-96)

55. *Lyle A. Vadnis, Electro Watchman, Inc., St. Paul, Minnesota.* This company furnishes telephone answering, direct connected and local alarm service in both the fire and burglary fields. It offers its own services on the same jobs in direct competition with companies attempting to sell central station service. (W26a, R. 5295-301, 5303, 5306, 5307-08, 497, 595-96)

56. *Roy Van Wagner, Autocall Company, Shelby, Ohio.* This company manufactures fire alarm equipment for proprietary systems. His proprietary systems compete with the central station systems of ADT and other firms. For example, proprietary systems have replaced central station systems in the manufacturing plants and warehouses of the Detroit automobile companies and in the Sears Roebuck stores. (W11a, R. 4866-69, 4875-76, 4879, 497, 595-96)

57. *Henry A. Walters, Ace Alarm Company and Weco Alarm Systems, Indianapolis, Indiana.* This company offers telephone answering and local alarm service in the burglary field. It bids these services to the same prospects for which ADT and others are offering central station service. (W47a, R. 5744-46, 5754-57, 497, 595-96)

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58. *Everett A. Westphal, Bay Alarm Company, Oakland, California.* This company furnishes local alarm, direct connected and telephone answering service in the burglary field, and it bids in competition against ADT. (W13a, R. 4927-28, 4941-43, 497, 595-96)

59. *Joseph G. Wilson, Central Burglar Alarm Service, Los Angeles, California.* This company furnishes local alarm, telephone answering and local service connected into another company's central station. It competes directly with and has taken accounts from ADT. So-called target burglar risks, such as jewelry, fur, liquor and tire stores, are in the market for central station services as well as Central's services. (W16a, R. 5004-07, 5013-15, 5017-19, 497, 595-96)

60. *Victor R. Zahn, Victor Burglar Alarm Company, Clifton, New Jersey.* This company provides local burglar alarms, local alarms connected to another company's central station, direct connected and telephone answering services. It attempts to and is successful in selling its services to the same prospects solicited by ADT and other central tations. (W46a, R. 5701-07, 5717-18, 497, 595-96)

61. *Gerson Zimmerman, Ace of Spades Burglar Alarm Co., Pittsburgh, Pennsylvania.* This company provides local, telephone answering and direct connected burglar services. It competes directly with ADT and other central station companies. (W5a, pp. 141, 173, R. 4685-87, 497, 595-96)

62. A survey undertaken for ADT by Arthur D. Little, Inc. shows that establishments having the same or similar lines of business, location and size (in terms of both number of employees and floor area) use not only accredited central station services but different forms of alarm systems and services. (R. 582-93, 596-603; WW-ZZ, AB-AD, R. 3863-994, 588, 594-607)

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Contemporaneous business records of the defendants show competition between accredited central station services and other forms of protection, including losses of central station prospects or subscribers to other forms of protection:

GX 287, R. 2178; A 36, R. 4334; A 78, R. 4365-66; D 15, R. 4472-74; D 89, R. 4523; D 92, R. 4524-25; D 93, R. 4525-26; D 97, R. 4526-27; E 3, R. 4530-31; E 4, R. 4532-33; E 6, R. 4533-34; E 7, R. 4534-37; E 8, R. 4538-39; E 9, R. 4541-43; E 10, R. 4543-46; E 13, R. 4547; E 14, R. 4548; E 15, R. 4549; E 16, R. 4550; E 18, R. 4551; E 19, R. 4553; E 22, R. 4555-56; E 32, R. 4557-58; E 48, R. 4559-60; E 56, R. 4563-65.

The following such documents are broken down by the type of competing form of protection described therein:

Local Service

A-38	B-72	D-63	F-3	H-22	H-33
A-41	B-74	D-75	H-5	H-24	H-33
A-57	B-76	E-34	H-6	H-25	H-34
A-84	B-86	E-36a	H-14	H-28	H-37
A-85	C-11	E-57	H-15	H-30	H-38
A-98	C-26	E-60	H-19	H-31	H-39
B-59	C-65	E-70	H-20	H-31	
B-64	C-87	E-91	H-20a	H-32	
B-68	D-62	E-99	H-21	H-32	

Proprietary Service

A-45	B-18	C-91	D-16	D-60	H-9
A-51	B-60	C-92	D-17	D-91	
A-52	B-63	C-96	D-18	E-8	
A-62	C-6	C-97	D-22	E-66	
A-69	C-48	C-99	D-23	E-99	
A-70	C-49	C-100	D-30	F-60	
A-71	C-51	D-11	D-32	H-4	
B-7	C-52	D-13	D-58	H-8	

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Telephone Answering Service

A-4	D-65
A-82	D-66
B-84	D-67
C-61	E-61
D-54	F-37

Auxiliary and Direct Connected Services

A-53	B-2	B-91	C-34	C-74	D-91	E-36a
A-57	B-8	B-92	C-38	C-76	D-92	E-48
A-61	B-11	B-94	C-39	C-78	D-93	E-57
A-63	B-12	B-95	C-40	C-80	E-3	E-77
A-64	B-14	B-97	C-41	C-94	E-4	E-84
A-65	B-15	B-100	C-43	C-96	E-7	E-89
A-66	B-19	C-2	C-50	D-1	E-8	E-91
A-67	B-30	C-3	C-53	D-4	E-9	E-92
A-68	B-31	C-7	C-54	D-28	E-10	E-93
A-79	B-38	C-8	C-55	D-34	E-21	F-6
A-80	B-43	C-9	C-57	D-38	E-22	F-16
A-86	B-75	C-10	C-59	D-39	E-27	F-17
A-88	B-77	C-12	C-60	D-45	E-29	F-18
A-90	B-79	C-14	C-65	D-47	E-30	F-20
A-91	B-86	C-16	C-66	D-62	E-31	H-40
A-95	B-88	C-21	C-71	D-75	E-34	

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Watchmen, Unapproved Central Station, Patrol and Miscellaneous Services

A-36	D-9	E-100
A-65	D-15	E-100
A-81	D-19	H-29
A-87	D-26	H-36
A-89	D-51	H-36
A-90	D-59	H-37
B-54	E-6	H-38
B-80	E-13	H-39
B-81	E-14	H-41
B-82	E-15	H-42
C-4	E-16	
C-25	E-18	
C-32	E-35	
C-53	E-58	
C-55	E-68	
C-89	E-71	
C-92	E-72	
C-95	E-73	
D-8	E-75	
	E-88	
	E-91	
	E-92	

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The following exhibits show that defendants' employees recognize that other forms of electric protection service are competitive with approved central station service:

Local Service

A-37	B-51	B-72	E-29	H-11
A-42	B-53	C-26	E-62	H-34
A-78	B-55	C-30	F-1a	H-35
B-5	B-57	C-31	F-2	
B-9	B-62	D-30	F-43	
B-20	B-71	D-33	H-10	

Proprietary Service

B-9	D-21	E-94
C-17	D-24	
C-62	D-25	
D-20	E-56	
C-97	D-30	

Telephone Answering Service

A-82	C-31	E-88
A-96	D-5	H-30
B-1	D-10	
B-83	E-14	
B-90	E-25	

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Auxiliary and Direct Connected Services

A-43	B-27	C-18	C-72	D-46	E-34
A-53	B-28	C-23	C-73	D-70	E-42
A-55	B-29	C-26	C-75	D-71	E-49
A-74	B-33	C-30	C-81	D-72	E-78
A-79	B-34	C-31	C-82	D-73	E-80
A-93	B-38	C-33	C-84	D-74	E-84
B-5	B-40	C-35	C-85	D-88	E-86
B-9	B-46	C-36	C-86	D-89	E-88
B-10	B-47	C-37	D-2	D-95	E-93
B-13	B-48	C-40	D-3	D-96	E-94
B-15	B-58	C-41	D-6	D-97	F-1a
B-17	B-66	C-42	D-29	D-100	F-20
B-22	B-67	C-47	D-35	E-5	F-39
B-23	B-73	C-53	D-36	E-8	F-51
B-24	B-88	C-55	D-41	E-25	H-7
B-25	C-1	C-56	D-42	E-28	I-5
B-26	C-14	C-58	D-43	E-32	I-6

Unapproved Central Station Service

C-29	F-31
C-30	F-44
C-31	F-56
E-2	
E-92	

Watchmen, Patrol and Miscellaneous Services

A-75	C-28	E-18	E-63
B-56	C-53	E-24	E-90
B-82	D-40	E-54	
B-98	D-49	E-59	
B-99	E-6	E-62	